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91-1990
No.

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TIPCO, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
Agricultural Marketing Service; and EDWARD MADIGAN,
Secretary, U.S. Department of Agriculture,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Judicial Officer for the Department of Agriculture has the absolute discretion to ignore the factual findings and credibility determinations of the Administrative Law Judge below?

2. Whether, in the context of a subsection of a statute that has never been interpreted in the 50 years since its passage, the Department of Agriculture has the complete and unfettered discretion to ignore the findings of fact and conclusions of law of the Administrative Law Judge and apply a concededly "novel" interpretation of the Perishable Agricultural Commodities Act's ("PACA") "implied duty" clause to revoke the licenses of PACA licensees for activities never before proscribed by Congress or by any prior decision of any court or administrative agency?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, TIPCO, Inc., prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on January 30, 1992.

OPINIONS BELOW

The Opinion of the Fourth Circuit Court of Appeals is unpublished and is reprinted in the petitioner's Appendix (hereinafter "Pet. App.") at 1a. The Opinion of the Judicial Officer of the United States Department of Agriculture (hereinafter the "Department") is reported at 50 Agric. Dec. 871 (Feb. 6, 1991), and is reprinted in

Pet. App. at 7a. The Opinion of the Administrative Law Judge (hereinafter "ALJ") of the Department is unpublished and is reprinted in Pet. App. at 55a.

JURISDICTION

On April 28, 1989, the Agricultural Marketing Service filed a complaint against the petitioner alleging violations of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*)." Pet. App. at 55a. On April 19, 1990, Administrative Law Judge Hunt dismissed the complaint holding that TIPCO "did not violate the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499 *et seq.*)." Pet. App. at 85a. On February 6, 1991, Judicial Officer Donald A. Campbell reversed that decision and imposed the maximum sanction on the petitioner, i.e. license revocation. Pet. App. at 53a. On June 14, 1991, TIPCO, Inc. filed a Petition pursuant to 28 U.S.C. § 2342(2) in the United States Court of Appeals for the Fourth Circuit seeking review of the Department's Order of February 6, 1991.[1] On January 30, 1992, a panel of the United States Court of Appeals affirmed the Department's Order. Pet. App. at 6a. On March 13, 1992, that panel also denied a timely Petition for Rehearing and, as well, denied the petitioner's suggestion for rehearing *en banc*. Pet. App. at 87a. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portion of Section 2(4) of the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499b (4) is as follows:

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[1] Since the filing of this case in the Fourth Circuit Court of Appeals, Edward Madigan has replaced Clayton Yeutter as Secretary of the United States Department of Agriculture. Accordingly, the caption in this Petition for Writ of Certiorari reflects this change.

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer; or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under Section 499e(c) of this title.

The pertinent portion of Section 499b is printed in Pet. App. at 92a. This case also involves Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, which is printed in Pet. App. at 91a. The regulation involved in this case is 7 C.F.R. § 46.26 (1991), which is printed in Pet. App. at 93a.

STATEMENT OF THE CASE

This is an action by the United States Department of Agriculture to revoke the PACA[2] license issued to the

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[2] "PACA was originally enacted by Congress in 1930 for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables. The essential need for regulation arose in the unfair activities of commission merchants, dealers and brokers who received shipments from growers and shippers. Upon receiving a shipment of perishable commodities, the commission merchants, dealers and brokers would wrongfully reject the shipment, in many cases making

petitioner, TIPCO, Inc. (hereinafter "TIPCO"). TIPCO is a wholesale supplier of produce located in the Maryland Wholesale Product Market in Jessup, Maryland. One of TIPCO's customers is Magruder's, Inc. (hereinafter "Magruder" or "Magruder's").

During August-December, 1988, Mr. James Bright, an investigator of the PACA Branch of the Department, was investigating Sid Goodman & Co., Inc. (hereinafter "Goodman"), another wholesale supplier in the Maryland Wholesale Produce Center, for allegedly paying a 25 cent per package fee to a buyer from Magruder's, Inc., William Crandall as well as other buyers. Stanford Steppa, the Vice-President of Magruder's told Mr. Bright[3] that if "this was the situation that was happening at Sid Goodman & Co., Inc. (i.e. Crandall receiving 25 cents per package from Goodman), that it definitely was happening with TIPCO, Inc., also." (JA 41).[4]

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the false claim that the commodities had arrived in a damaged condition or some other claim permitting rejection of the shipment. These fraudulent rejections were made when the market for the commodity was declining so that the commission merchant, dealer or broker would have suffered a loss had he accepted the shipment and paid the contract price. Essentially the Act provides a system of licensing and penalties for violations." *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 990 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974) (citations omitted). "The Perishable Agricultural Commodities Act is enforced by the Secretary of Agriculture. Through delegations of authority, the operating agency currently responsible for the daily administration of the program is the Regulatory Branch of the Fruit and Vegetable Division of the Agricultural Marketing Service." 10 Dr. Neil E. Harl, *Agricultural Law* § 72.01[3] (1989).

[3] Investigator Bright's report states that it was Magruder's belief that an unauthorized payment which Stanford Steppa referred to as "brokerage" was being paid to Mr. Crandall. (JA 455). It was Standford Steppa, not Investigator Bright, who used the terms "unauthorized payment" and "brokerage" to describe the alleged payment from TIPCO as a bribe as opposed to an extorted payment extracted from TIPCO by Magruder's.

[4] References to the JA are to the Joint Appendix filed in the Fourth Circuit Court of Appeals.

Thereafter, Mr. Bright's supervisor, Thomas Leming, instructed him to conduct an investigation of TIPCO. Frank Spinale, TIPCO's manager, told Investigator Bright that TIPCO had dealt with Magruder's over the years, but around December, 1987, Magruder's buyer, William Crandall (hereinafter "Crandall") approached Spinale about empty warehouse space TIPCO had, and about TIPCO becoming a major supplier for Magruder's. Mr. Spinale told Investigator Bright that in June, 1988, Crandall approached Frank Spinale and requested that TIPCO pay Crandall a 25 cent "brokerage" fee. (JA 47, 48). Indeed, at the time William Crandall approached Frank Spinale in June, 1988 requehting the 25 cents per package brokerage payment, Magruder's owed TIPCO $276,651.65 (which debt was to grow to over $340,000 by the end of 1988). Mr. Spinale further advised Investigator Bright that the 25 cent payment came out of TIPCO's one-dollar profit margin on items sold by TIPCO to Magruder's.

On April 28, 1989, the Agricultural Marketing Service (hereinafter "AMS"), filed a complaint seeking the revocation of TIPCO's license pursuant to Section 8 of the Perishable Agricultural Commodities Act (7 U.S.C. § 499 (h)). Pet. App. at 55a. On September 8, 1989, in response to the Administrative Law Judge's Order that the AMS amend its Complaint to include a more definite statement, the AMS filed an Amended Complaint[5] alleging that the petitioner had violated three of the four clauses of Section 2(4) of the PACA (7 U.S.C. § 499(b)(4)).[6]

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[5] The initial Complaint alleged, without further definition, that the petitioner violated Section 2(4) of the PACA (7 U.S.C. § 499 (b)(4)), which contains four separate provisions of actions which are deemed unlawful.

[6] Section 2(4) of the PACA (7 U.S.C. § 499(b)(4)) provides that:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * *
>
> (4) For any commission merchant, dealer, or broker [i] to make, for a fraudulent purpose, any false or misleading state-

In stating the facts allegedly supporting the petitioner's alleged violation of the PACA, the AMS produced a verbatim text of the language of Section 2(4) in its Amended Complaint, and concluded that the petitioner violated that section of the PACA. With respect to the alleged violation, the petitioner answered that "Magruder's Inc. extorted kickbacks from [the petitioner] by threatening not to purchase perishable agricultural commodities from [the petitioner] if [the petitioner] did not pay it a certain amount of money for each package of produce it purchased from [the petitioner]." (JA 5). TIPCO further answered that "Magruder's either knew of the extorted kickbacks or was so negligent in supervising its employee, William Crandall, that he was allowed to extort the payments from the [petitioner]". (JA 5, 6).

A hearing was conducted on October 19, 20 and November 22, 1989 before Administrative Law Judge ("ALJ") James W. Hunt. Mr. Frazier, the Assistant PACA Branch Chief, explained that Stanford Steppa's lack of knowledge of the payment from TIPCO to Crandall was critical in bringing this action. (JA 200). Mr. Frazier testified that if Stanford Steppa knew that Crandall was receiving payments from TIPCO, the payment

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ment in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be brought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; [ii] or to fail to refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; [iii] *or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction*; or [iv] fail to maintain the trust as required under Section 5(c) (emphasis added).

would not constitute a violation of the PACA. (JA 220-21).[7]

The third clause of Section 2(4) of the PACA prohibits the failure to perform an express or "implied duty." With respect to this alleged violation, James Frazier testified that there is an obligation established by the PACA to make known any overture from a buyer (Mr. Crandall) to a supplier (TIPCO) for a payment. (JA 210). When asked what establishes that obligation, Mr. Frazier responded that one "has a duty as a PACA licensee to deal overboard and upright". Mr. Frazier further stated that: "[i]n the regulations and the Act, it says duties express or implied in connection with all of the transaction." (JA 211). When asked if there is a specific regulation that substantiates his interpretation, Mr. Frazier stated that 46.26[8] is the *closest* regulation that "relates generally to this situation" (emphasis added). (JA 212). Mr. Frazier testified that there was clearly no failure to perform any express specification or duty on the part of TIPCO, and that the Department was relying solely on the alleged violation by TIPCO of the "implied duty" clause of the statute. However, Mr.

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[7] James Frazier testified that:

> [T]here would not have been a false and misleading statement if [Stanford Steppa] had known about [the payments]. I do not think that is a practice that the Department would want to encourage or condone, but I think that it would have been more difficult in framing an action. (JA 221).

[8] 7 CFR 46.26 is appended hereto as Pet. App. at 93a. That regulation provides that:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the [PACA].

Frazier testified that based on his knowledge and experience, PACA has taken no steps to specifically advise licensees that payments to employees of buyers may constitute grounds for license revocation or any other sanction. (JA 216).

On April 9, 1990, ALJ Hunt filed his Initial Decision and Order which concluded that TIPCO "did not violate the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499, *et seq.*)." *See* Pet. App. at 85a. As a result, ALJ Hunt dismissed the complaint and amended complaint.

In addressing the AMS' first allegation of "false and misleading statements to Magruder's," ALJ Hunt determined, in his "Findings of Fact," [9] that "Magruder's became aware of the payments from [petitioner] to Crandall and allowed them to continue." Pet. App. at 85a. This finding was based, in part, on ALJ Hunt's evaluation of Stanford Steppa's credibility as a witness:

> Based on Steppa's demeanor and testimony at the hearing. . . his testimony was not credible that he did not know of the payments from TIPCO to Crandall. Pet. App. at 82a.

ALJ Hunt concluded that, because "[Stanford] Steppa, Magruder's executive vice president, knew of the payments [between Crandall and TIPCO] and allowed them to continue . . . , Magruder's did not have false or misleading information relating to its purchase of produce from TIPCO." [10] *Id.*

With respect to the third clause of Section 499(b)(4), ALJ Hunt held that "I do not find that a licensee has a

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[9] The ALJ's "Findings of Fact" are contained in Part V of his Decision and Order. Pet. App. at 84a. The ALJ's Findings of Fact include not only the facts of the case, but significantly, ALJ Hunt's unerring credibility determinations.

[10] Because the AMS conceded that the second clause was not applicable to the activities of the petitioner, ALJ Hunt did not address any alleged violation of the second clause of § 499(b)(4).

fair dealing duty to report to a customer [Magruder] an attempt by the Customer's employee [Mr. Crandall] to obtain money from the dealer [TIPCO]." Pet. App. at 74a. In so holding, ALJ Hunt determined that "[t]here is, in this case, no clear statutory authority and there are certainly no explicit standards for complainant to follow in determining what constitutes the vague duty to 'deal fairly.'" *See* Pet. App. at 75a.[11]

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[11] ALJ Hunt further noted that "[i]n the circumstances here, a strong case of extortion could be established (that is rather than being corrupted, [William] Crandall the employee was doing the corrupting)." (JA 643). Because he found no PACA violation, the Administrative Law Judge stated it was unnecessary to address the petitioner's extortion argument. However, in light of the Judicial Officer's reversal of the ALJ's decision, and the Fourth Circuit's decision affirming the order of the Judicial Officer, the petitioner's extortion argument deserves revisiting. The record supports no other conclusion that: (1) Magruder's, through Crandall, greatly expanded its business with TIPCO on or before January, 1988; (2) there is no proof of any payments by TIPCO until June, 1988; (3) TIPCO (the "weak sister" according to Stanford Steppa's testimony) dedicated substantial space in its facility to satisfy Magruder's warehousing needs and did not pursue alternative uses for said space; (4) once TIPCO was locked in after nearly a half year of expanded operations, Magruder's Assistant Vice President, William Crandall, who was 100% in charge of purchasing, demanded and received checks for brokerage from TIPCO (JA 157-58, 250-51); and (5) at the time the payment of brokerage from TIPCO to Crandall began, Magruder's owed TIPCO over $275,000 for commodities which had been previously supplied by TIPCO and used previously by Magruder's. (JA 251, 603-14).

This record demonstrates that, only after TIPCO was sucked in did Magruder's Assistant Vice President, 100% in charge of produce, make his demand. Logic, common sense and good judgement compel recognition that, if a bribe or "inducement" had been contemplated, payments would have preceded the expanded relationship.

It is well settled that, under the Hobbs Act, 18 U.S.C. 1951, "[e]xtortion is the wrongful use of economic fear to obtain money." *United States v. Burke*, 781 F.2d 1234, 1233 (7th Cir. 1985). In *United States v. Brecht*, 540 F.2d 45 (2nd Cir. 1970), the Court applied the Hobbs Act to a private business situation. The Court recognized that the difference between a "commercial bribe and extortion of a payment is thin" but concluded that "if the defend-

Thereafter, the Department noted an appeal from the Decision and Order of ALJ Hunt. On February 6, 1991, without the benefit of hearing and seeing the witnesses, Judicial Officer Donald A. Campbell reversed ALJ Hunt's decision, and held that because, in his interpretation, TIPCO "violated the PACA as alleged in the complaint, [t]he license of TIPCO, Inc. is revoked." Pet. App. at 53a. Judicial Officer Campbell issued a stay order which stays the imposition of the revocation of the petitioner's license until the completion of judicial review of his decision. Pet. App. at 86a. Thereafter, the petitioner filed a timely petition for appeal on June 14, 1991, pursuant to 28 U.S.C. §§ 2342(2), 2343, 2344 and Rule 15(a) of the Federal Rules of Appellate Procedure. The Fourth Circuit Court of Appeals upheld the Judicial Officer's decision which revoked the petitioner's license, holding that:

> The reasons for [Judicial Officer's] departure in this case . . . turn on the J.O.'s differing interpretation of the evidence regarding Magruder's knowledge, or lack thereof, of the payments to Crandall." Pet. App. at 5a.

With respect to the alleged violation of the implied duty clause of PACA, the Fourth Circuit held:

> The courts must afford deferential treatment to an agency's construction of a statute which Congress entrusted to its administration. Pet. App. at 6a.

TIPCO filed a Petition for Rehearing and Suggestion for Rehearing In Banc arguing that the Department of Agriculture erred in proceeding upon and deciding the "novel" issue of "implied duties" through the adjudicatory process instead of by the promulgation of a rule or regulation under the applicable statute. The petitioner

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ant purports to have the power to hurt the victim in economic terms and fear is induced, the solicitation becomes an extortionate demand." 540 F.2d at 51 n.11; *Cf., Evans v. United States*, No. 90-6015, 1992 U.S. LEXIS 3122, at *10 (May 26, 1992).

further contended that the Fourth Circuit Court of Appeals, in its unpublished opinion, overlooked a material legal standard requiring the resolution of this admittedly "novel" issue of "implied duties" through the promulgation of a rule, regulation or statute, instead of through the administrative adjudicatory process. Although the Court directed the Department of Agriculture to file an Answer (Pet. App. at 89a), the Fourth Circuit Court of Appeals declined to rehear the issues on March 13, 1992. Pet. App. at 87a.

REASONS FOR GRANTING THE WRIT

I. THE JUDICIAL OFFICER FOR THE DEPARTMENT OF AGRICULTURE DOES NOT HAVE THE ABSOLUTE DISCRETION TO IGNORE THE FACTUAL FINDINGS AND CREDIBILITY DETERMINATIONS OF THE ADMINISTRATIVE LAW JUDGE BELOW. THIS COURT'S REVIEW NOW OF THE FOURTH CIRCUIT'S AFFIRMANCE OF THAT UNBRIDLED DISCRETION IS IMPERATIVE TO ENSURE THE SUCCESS OF THE ENTIRE ADMINISTRATIVE LAW JUDGE SYSTEM.

Review on writ of certiorari is appropriate "when a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court." Sup. Ct. R. 10.1(a). Here, the Fourth Circuit Court of Appeals affirmed the Judicial Officer's Decision and Order, which ignored in toto the Administrative Law Judge's credibility determinations and factual findings.

In these proceedings, the Department of Agriculture has imposed the ultimate sanction—delicensure [12]—in a case where the ALJ threw out the Department's case in large measure because a critical witness was not credible.

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[12] It is well settled that a license is a property right which cannot be taken by the government without notice and due process of law. *Barry v. Barchi*, 443 U.S. 55, 64 (1979).

The Department is righteously indignant over alleged undermining of the integrity of its licensing system by the fees paid to a customer's buyer. On the other hand, the petitioner is unabashedly perplexed by the Department's ability to quash an ALJ's decision. If the Fourth Circuit can affirm an administrative agency's reversal of an ALJ's decision and resurrect the agency's prosecutorial decision, the administrative law process becomes nothing more than administrative dictate. This case, unless the Fourth Circuit Court of Appeals' opinion is reviewed, will be a paradigm for disregard of trier of fact determinations.

The administrative judicial system places the ALJ in the best position to evaluate the facts, the demeanor of witnesses and the evidence of the case. *See Conair Corp. v. NLRB*, 721 F.2d 1355, 1368 (D.C. Cir. 1983) (ALJ's assessments upheld unless they are "hopelessly incredible" or "inherently unreasonable"); *Mattes v. United States*, 721 F.2d 1125, 129 (7th Cir. 1983); *Kopack v. NLRB*, 668 F.2d 946, 954 (7th Cir. 1982). Accordingly, it is well settled that the agency should be reluctant to disturb the ALJ's findings unless error is clearly shown. *See* 1941 ATT'Y. GEN. COMM. AD. PROC. REP. 51. Indeed, the Judicial Officer in this case (Donald M. Campbell) recognized the deference given to the ALJ's determinations in his own decision in *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955 (1982):

> That is why Administrative Law Judges must meet such stringent requirements and are selected with such great care. The proper exercise of the fact-finding function is of great importance both to the Agency and the respondents in particular cases. In recognition of the role of the Judicial Officer . . . and the role of the Administrative Law Judges, it is the policy of the Judicial Officer to reverse an Administrative Law Judge's Findings of Fact *only* where the record *compels* such action. *Id.* at 957 (emphasis in original).

The deference afforded the ALJ's evaluation of credibility stems from the premise that credibility determinations are often made upon demeanor of witnesses. *See NLRB v. Holly Farms Poultry Ind., Inc.*, 970 F.2d 983, 984-5 (4th Cir. 1972) (trial examiner's findings dependent upon his evaluation of witness credibility upheld).

In this case below, the Judicial Officer unilaterally —and without support in the record—rejected ALJ Hunt's factual determinations and his credibility determinations. In so doing, Judicial Officer Campbell ignored the well settled deference afforded to the ALJ's findings of fact and evaluations of the credibility of the witnesses that appeared before him. Indeed, Judicial Officer Campbell was so predisposed to find that petitioner had violated the PACA, he went so far as to reverse a prior decision of his own to concoct a violation of the PACA.[13]

Indeed, legislative history of the Administrative Procedure Act buttresses the significant role of the ALJ. Section 556(c) of the Administrative Procedure Act was designed to assure all parties that the ALJ will perform a real function rather than serve merely as a notary or policeman. *See* House Committee Sen. Doc. No. 248, 79th Cong., 2d Sess., 269 (1946). The ALJ system was instituted as a separate enactment of Congress. Accordingly, there must be a degree of independence and credibility which is extended to the ALJ's findings of fact and

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[13] In his Decision and Order in this case below, Judicial Officer Campbell states that:

> [Petitioner] relies on my statement in *In re Hampshire Open Air-Mkt., Inc.*, 41 Agric. Dec. 955, 957 (1982), that it is the 'policy' of the Judicial Officer to reverse an ALJ's findings of fact only where the record 'compels' such action. *Just as court decisions are, at times, quietly laid to rest without being expressly overruled, I have found it necessary to ignore that 'policy' in a number of subsequent cases. It is appropriate, now, to expressly overrule the self-imposed limitation set forth in Hampshire.*

Pet. App. at 35a. (emphasis added).

credibility determinations. Where, as here, the ALJ's credibility determinations are given no weight or effect, there is simply no reason for an impartial ALJ to even hear the case initially. In short, if the Department can overrule the ALJ on a whim, then there is no reason whatsoever for the ALJ system.

Upon judicial review, however, the courts are required to give special weight to the ALJ's findings of fact and credibility determinations. In *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1302 (9th Cir. 1979), the Court reversed a National Labor Relations Board decision that reversed an ALJ's finding of facts. The Court explained: "[w]hen credibility is at issue . . . the decision of the ALJ will be given special weight [and] the Board's Findings of Fact will be scrutinized more critically if they contradict those of the ALJ." *Id.* at 1305. *See also Abbott Laboratories v. NLRB*, 540 F.2d 662, 667 (4th Cir. 1976) (By "affording the hearing officer's credibility determinations the respect to which they are entitled, we cannot say that the record fails to support his conclusion").

Moreover, if the Judicial Officer actually differs in his findings of fact from those findings of the ALJ, then the Judicial Officer is required to set forth specifically why his findings differ from those of the Administrative Law Judge. *See Alabama Ass'n of Ins. Agents v. Board of Governors of the Federal Reserve System*, 553 F.2d 224, 247 (5th Cir. 1976), *cert. denied*, 98 S. Ct. 1448 (1978) ("Although we are inclined to uphold the Board where it clearly explains its reasons for differing with the ALJ, its findings will be vulnerable where it merely announces an opposite conclusion from the ALJ without explanation"); *See also Int'l Brotherhood of Teamsters v. NLRB*, 587 F.2d 1176, 1181 (D.C. Cir. 1978) (Court found the Board's findings were unsupported by substantial evidence because the Board cannot "merely state that it disagrees" but must "set forth the basis of [its] disagreements"). In this case, the Judicial Officer not only failed to give weight

to ALJ Hunt's Findings of Fact, but he also failed to adequately support his findings. In his Decision and Order, Judicial Officer Campbell concludes:

> I must conclude that the defense relied upon by [petioner]—that it didn't know that paying its customer's employees to purchase produce from it without notifying the customer, would violate the PACA—has very little merit . . . The implication in Spinale's testimony that he considered this payment to be a 'brokerage' is just not credible. Pet. App. at 26a.

The J.O. offers, without any explanation:

> 'Spinale's years of experience in the produce business negates this possibility.' *Id.*

Despite the Department of Agriculture's burden of coming forward with evidence to prove Magruder did not know about the payments to satisfy a violation of the PACA (*See* 5 U.S.C. § 556(d); *Basma v. United States Department of Agriculture*, 654 F.2d 804, 810 (9th Cir. 1984), the Judicial Officer ignored the factual findings of the ALJ and accredited solely Mr. Steppa's testimony that "he did not know." The Judicial Officer cannot ignore the record established at the hearing before the ALJ because he wishes to "send a message" to "this multi-billion dollar industry." *See In re TIPCO*, 50 Agric. Dec. 871, 908 (Feb. 6, 1991) Pet. App. at 52a, 53a. The department of agriculture by and through the Judicial Officer judged Mr. Steppa's credibility; credibility instead was more properly the province of the administrative law judge.

II. THE INTERPRETATION OF THE NATURE AND SCOPE OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT'S "IMPLIED DUTY" CLAUSE IS "AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT." THIS COURT'S REVIEW OF THE DEPARTMENT OF AGRICULTURE'S NOVEL INTERPRETATION OF THE "IMPLIED DUTY" CLAUSE OF THE PACA IS NEEDED TO AVOID THE REVOCATION OF THE LICENSES OF THE PETITIONER AND OTHER PACA LICENSEES ON ACCOUNT OF ACTIVITIES NEVER BEFORE PROSCRIBED BY CONGRESS OR BY ANY PRIOR DECISION OF ANY COURT OR ADMINISTRATIVE AGENCY.

The granting of a petition for a writ of certiorari is appropriate where—as here—"a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). Indeed, before this case was decided by the Fourth Circuit Court of Appeals, the Judicial Officer reversed a finding by the Administrative Law Judge below who held that the petitioner did not violate the "implied duty" clause of the PACA. Thus, in direct contravention of the findings of fact of the Administrative Law Judge, the Judicial Officer revoked the license of the petitioner, expressly noting his overriding concern that to hold otherwise (and thereby affirm the Administrative Law Judge's decision) would not send the right "message" to "this multi-billion dollar industry." *See In re TIPCO, Inc., supra;* 50 Agric. Dec. at 908. Pet. App. at 52a, 53a.

The Fourth Circuit Court of Appeals has affirmed the Department of Agriculture's imposition of the most serious sanction, allowable under the Perishable Agricultural Commodities Act—permanent license revocation—on TICPO, a small family business with no prior history of PACA violations. The Department of Agriculture concedes that it has never previously alleged, nor has Congress expressed any intention, that the conduct with which TIPCO is

charged, i.e., payments to one retail customer, is a violation of the PACA. Regardless of how improper the Department of Agriculture may believe TIPCO's conduct to be, the PACA does not authorize the Department to "send this message" for the first time by putting TIPCO out of business. Furthermore, even if the PACA could be construed to include such payments in its amorphous "implied duty" section of the Act, the revocation of the license of the first alleged violator in an adjudication—without any prior notice that such conduct could be considered a violation of the Act—violates the teaching of *SEC v. Chenery Corp.*, 332 U.S. 194 (1946) and its progeny. Notwithstanding that there is admittedly no "conflict in the circuits," TIPCO respectfully prays that this Court grant the petition for a writ of certiorari so as to further examine and define the distinctions in regulatory activity by way of statutes, rules or regulations as opposed to "ad hoc" litigation.

Moreover, the proper resolution of the scope of the Perishable Agricultural Commodities Act's "implied duty" clause is a matter of importance not only to the petitioner and the respondents, but also to the more than 15,000 other PACA licensees, many of whom, like TIPCO, Inc., are small family-run businesses.[14] *See e.g. Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (certiorari is appropriate where the issue was important to thousands of similarly situated persons).[15]

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[14] *See* H.R. Rep. No. 794, 100th Cong., 2d Sess. 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1536, 1537.

[15] This Court previously denied certiorari to another PACA license charged with engaging in similar activities as the petitioner. *See Sid Goodman & Company, Inc. v. United States of America*, petition no. 91-1162. However, the facts of this petition differ substantially from the facts established in the *Goodman* case. In contrast to the Goodman case, the Administrative Law Judge below reasoned that petitioner did not violtae the implied duty" clause of the PACA, and in his judgment, a strong case of extortion could be made out by the petitioner under the testimony elicited at the hearing. However, the extortion issue in the TIPCO case (which was never presented in the *Goodman* case), was never decided be-

Review on a petition for a writ of certiorari is particularly appropriate where—as here—"the construction of a major federal statute" is at issue. *See e.g. United States v. Donovan*, 429 U.S. 413, 422 (1977). Indeed, the 50 years since the enactment of the subsection of the statute at issue (7 U.S.C. § 499(b)(4)) have yielded no reported case interpreting or expanding the ambit of the statute to cover the activities allegedly undertaken by the petitioner.[16] Significantly, during the same period of time, there has never been a regulation passed that addresses the activities of the petitioner.

The Department of Agriculture has acknowledged in prior pleadings filed in this case[17] that the proper interpretation of the "implied duty" clause of the Perishable Agricultural Commodities Act is a "novel" issue. Although no "conflict in the circuits" exist, that is no basis to deny the extant petition. Certiorari is often appropriate where the issue presented is a "novel" question. *See e.g. Kossick v. United Fruit Co.*, 365 U.S. 733 (1961) (granting certiorari because the case presented "novel" questions of law).

In its opinion, the Fourth Circuit Court of Appeals announces a "novel" interpretation of the scope of the "implied duties" clause of the Perishable Agricultural Commodities Act (hereinafter "PACA") (7 U.S.C. § 499(b)(4)) (West Supp. 1991), which has never heretofore been interpreted or enforced by the Department of Agriculture (hereinafter "The Department"). In so doing, the Court ignored a material legal standard requiring the resolution

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cause of the ALJ's determination that the petitioner committed no violation of the PACA.

[16] Indeed, our research—thorough we trust—has unearthed only one published decision which addresses this provision of the PACA. *See W.J. Westcott v. Yonk Rubin & Son*, 122 F. Supp. 888, 891-92 (E.D. Pa. 1954).

[17] *See* complainant's request for reconsideration of order granting motion for more definite statement at 1 n.2. (JA 12 n.2).

of this admittedly "novel" issue through the promulgation of a rule, regulation or statute, instead of through the administrative adjudicatory process. Indeed, the Opinion by the Fourth Circuit Court of Appeals is totally absent of any discussion whatsoever of the petitioner's contention that the Court of Appeals erred in deciding the novel issue of the proper interpretation of the "implied duty" clause of the PACA through the adjudicatory process as opposed to by regulation or by rule.

In revoking the petitioner's license, the Judicial Officer below noted his concern that holding otherwise would not send the right "message" to "this billion dollar industry." *See In re Tipco, supra*, 50 Agric. Dec. at 908. In short, because the Department of Agriculture deems that it cannot condone the payment of money from a licensee to the produce buyer for a grocery chain, it has created a violation of a statute that has never been interpreted before to apply to such activity. Indeed, the Department acknowledges that it has never before suggested that the activities of the petitioner violate the PACA. Moreover, the Department failed to deter such conduct by regulations, policy statements or any other means that would have provided PACA licensees with prior notice of the Department's new-minted position. Instead, the first notice to PACA licensees that the Department interpreted the activities of the petitioner to violate the "implied duties" clause of the PACA has been this case and the companion case of Sid Goodman and Company.

The Department's actions were not a rule-making exercise. Nevertheless, a new "rule" was divined. Unpublished and uncodified standards of conduct have become the predicate for the ultimate sanction of revocation of the petitioner's license. The 50 years since the enactment of the amendment to the PACA which added the "implied duties" clause to 7 U.S.C. § 499(b)(4) have yielded no reported case or a regulation passed interpreting or ex-

panding the ambit of the statute to cover the situation at bar.[18]

In concluding that the petitioner violated the PACA, the Fourth Circuit Court of Appeals condoned the resolution of this "novel" issue of "implied duties" through the adjudicatory process as opposed to the promulgation of a rule, regulation or statute. Although agencies have some discretion to announce new interpretations of statutes through adjudication, that discretion is available only in limited situations—none of which is present in this case. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). In *SEC v. Chenery*, this Court addressed how administrative agencies should deal with regulatory statutes when their proper administration required the agency to "fill . . . in the interstices of the Act."[19] Although this Court in *Chenery* described certain situations wherein it might be necessary to "fill in" these gaps in the course of adjudication, the Court also noted that adjudication should be the exception rather than the general rule. The Court noted that "[t]he function of filling in the interstices of the Act should be performed, *as much as possible*, through this quasi-legislative promulgation of rules to be

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[18] The fact that the implied duty clause has never before been interpreted in this manner in the 50 years since its enactment, reinforces the error in the Department's construction. *See e.g., Arcadia v. Ohio Power Co.*, —— U.S. ——, 111 S. Ct. 804 (1991) (rejecting a similar attempt to invoke an alleged catch-all provision, noting that "in 50 years of administering the Federal Power Act, FERC and its predecessor, the FPC, have never decided an issue under § 318 except in connection with orders promulgated under those four sections [preceding the alleged catch-all provision]. Never before this case has § 318 been used as a general conflicts provision").

[19] The Supreme Court has noted that, although *Chenery* did not involve the section of the Administrative Procedure Act applicable here, *i.e.* 5 U.S.C. § 553 it "is nevertheless analogous." *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 292 n.23.

applied in the future." *Chenery, supra*, 332 U.S. at 202 (emphasis added).

In *Chenery*, this Court properly required rulemaking *as much as possible*, yet here, there was no reason established whatsoever as to why the Department could not have adopted its newly-minted interpretation of the implied duty clause in a rulemaking proceeding. Indeed, the Supreme Court has continued to apply *Chenery* and its progeny to hold that agency's do not have absolute and unfettered power to decide cases by adjudication rather than rulemaking. *See e.g. Martin v. Occupational Safety and Health Review Comm'n.*, 499 U.S. ——, 111 S. Ct. 1171, 1179 (1991); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

In *Chenery*, the Supreme Court opined that rulemaking was not "possible" in a number of situations: (1) where the agency must reserve the power to respond to "unforeseeable situations"; (2) where the agency has had insufficient experience to warrant "rigidifying its tentative judgment into a hard and fast rule"; and (3) where the problem is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery, supra*, 332 U.S. at 202-03. Therefore, "[*i*] *n those situations*, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective." *Id.* (emphasis added).

The Department of Agriculture, however, was not in one of "those situations" explicated in *Chenery* when it elected to proceed by adjudication in adopting its novel interpretation of the implied duty clause. First, the respondent cannot justifiably claim that payments to suppliers in the produce industry are not common. The Department acknowledged that it was aware of such activity, but had never seen an investigation with sufficient evidence to bring an action similar to this case. (JA 195). The Department's investigation of such sim-

ilar cases and its consideration of legal action in those cases demonstrates that similar disciplinary actions in the future were indeed foreseeable.

Second, the Department of Agriculture clearly had experience to warrant "rigidifying its tentative judgment into a hard and fast rule." The Department's contemplation of disciplinary action in previous cases buttresses the fact that the Department believed that such conduct violated the PACA. Moreover, and significantly, the Department had interpreted and enforced the Packers and Stockyards Act to *expressly* prohibit unauthorized payments to suppliers for years. Hence, the Department had no reason to refuse to rigidify in a rule or regulation its judgment that the activities of licensees situated similarly to the petitioner were prohibited by the "implied duty" clause of the PACA.

Third, the Department cannot contend that unauthorized payments to suppliers in the produce industry is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." Indeed, under the Packers and Stockyards Act, the Department has issued policy statements to clarify its position concerning the exchange of payments between purchaser and seller. Similar regulatory prohibitions under the PACA could have been made.[20] Therefore, under *Chenery* the Department abused its discretion by failing to proceed by rulemaking. The Fourth Circuit Court of Appeals compounded that error by addressing none of these limitations on the authority of the Department to take such adjudicative action.

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[20] The record in this case demonstrates that there is an advisory committee, an industry advisory committee, appointed by Congress to review the PACA and its administration, and to recommend any proposed changes to the PACA and to Congress. (JA 217-18). Significantly, the advisory committee is not recommending any changes in the statute which would expressly require suppliers report overtures made by representatives of buyers for alleged kickbacks. (JA 219).

Further, the Court below ignored the mandate of *NLRB v. Bell Aerospace*, 416 U.S. 267 (1974). In *Bell Aerospace*, the Supreme Court warned that "[t]here may be situations where . . . reliance on adjudication would amount to an abuse of discretion." *Id.* at 294. In *Bell Aerospace*, this Court, through Mr. Justice Powell, distinguished the consequences allowed there stating:

> . . . this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements. *Nor are fines or damages involved here . . . .*"

Id. (emphasis added); *Cf. Heckler v. Community Health Services*, 467 U.S. 51, 60 n.12 (1984).[21] In this case, despite the most severe sanction of license revocation, the Court below chose not to address this limitation on the Department's authority.

Relying on the quoted language from *Bell Aerospace*, the Ninth Circuit prevented the Immigration and Naturalization Service from establishing a new standard through adjudication when its application would result in deportation or voluntary departure, *i.e.*, a punitive sanction. *See Ruangswag v. INS*, 591 F.2d 39 (9th Cir. 1978). The Court looked at the lack of notice and the severity of the consequences to conclude that the agency abused its discretion in imposing "substantial adverse consequences" through the adjudicatory process. *See* 591 F.2d at 44. Revocation of TIPCO's license clearly is a substantial adverse consequence which, under *Bell* as interpreted by *Ruangswag*, may not occur, without notice, by the adjudicatory process. Note, *Behat v. Sureck*, 637

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[21] *See also Morton v. Ruiz*, 415 U.S. 199, 232 (1974) ("The Administrative Procedure Act was adopted to provide, *inter alia*, that the administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid *ad hoc* determinations"); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982) ("An agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application").

F.2d 1315 (9th Cir. 1981); *Natural Gas Pipeline Co. v. FERC*, 590 F.2d 664 (7th Cir. 1979), *cert. denied*, 445 U.S. 916 (1980); *Drug Package Inc. v. NLRB*, 570 F.2d 1240 (8th Cir. 1978). In *Stoller v. Commodities Futures Trading Comm'n*, 834 F.2d 262, 266 (2nd Cir. 1987) that "like the ALJ, we are unaware of any prior instances in which the Commission sought sanctions against anyone who engaged" in a certain form of "futures" trading, wrote:

> The Commission may well have the power to construe the statute in such a subtle and refined way, but the public may not be held accountable under this construction without some appropriate notice. 834 F.2d at 267.

See also Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982) ("One of the basic characteristics of law is that potential violators have, or can obtain, notice of it. No notice of the FTC's view of the law has been pointed out to us"). Consequently, "the FTC has exceeded its authority by proceeding to create new law by adjudication rather than by rulemaking." *Id.* at 1010.

Subsequent decisions by the Supreme Court have continued to recognize that rulemaking may indeed be *required* in certain cases. In *Morton v. Ruiz*, 415 U.S. 199 (1974), this Court stated:

> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations. *Id.* at 232.

As in *Morton*, TIPCO has an important property interest *i.e.*, its license [22] which is denied in an adjudicative proceeding by the application of a novel statutory inter-

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[22] *See Barry v. Barchi*, 443 U.S. 55, 64 (1979) (noting the property interest in a licensee).

pretation which had not previously been announced by the regulating agency.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Date: June 10, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1435

TIPCO, INCORPORATED,
Petitioner,

v.

CLAYTON YEUTTER, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE;
DEPARTMENT OF AGRICULTURE;
AGRICULTURAL MARKETING SERVICE,
Respondents.

On Petition for Review of an Order of the
United States Department of Agriculture.
(89-528-D)

Argued: October 29, 1991

Decided: January 30, 1992

Before WILKINSON and NIEMEYER, Circuit Judges,
and YOUNG, Senior United States District Judge for the
District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: M. Albert Figinski, Stuart Ross Berger, WEINBERG & GREEN, Baltimore, Maryland, for Petitioner. Leslie Karen Lagomarcino, Office of General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington, D.C., for Respondents. ON BRIEF: Alexandra K. Thomas, WEINBERG & GREEN, Baltimore, Maryland, for Petitioner. James Michael Kelly, Associate General Counsel, Raymond W. Fullerton, Assistant General Counsel, Margaret M. Breinhold, Deputy Assistant General Counsel, Office of the General Counsel, UNITED STATES DEPARTMENT OF AGRICULTURE, Washington, D.C., for Respondents.

OPINION

PER CURIAM:

Tipco, Inc., a wholesale supplier of produce in the Maryland Wholesale Produce Market, appeals from the Secretary of Agriculture's Decision and Order revoking Tipco's Perishable Agricultural Commodities Act ("PACA") license after a finding that Tipco made regular payments to William Crandall, an assistant vice president and employee of one of Tipco's key customers, Magruder's, Inc., in exchange for Magruder's continued business. Tipco argues on appeal that the Judicial Officer ("JO") erred in concluding that Tipco violated an implied duty under the PACA, 7 U.S.C. § 499b(4) (1988); that the JO erred in deciding the novel issue of implied duties through the adjudicatory process rather than through rulemaking; and that the JO abused his discretion in sanctioning Tipco with license revocation.

I.

Tipco supplied Magruder's with vegetables through Crandall from 1981 to 1988. The business relationship between Tipco and Magruder's deepened in December, 1987, when Crandall negotiated an agreement with Tipco Manager Frank Spinale to rent Tipco's empty warehouse bays for storing produce purchased and distributed by Magru-

der's. Tipco then became Magruder's main supplier and began delivering large quantities of produce, including fruit. The parties operated under a pricing agreement whereby Magruder's paid Tipco $1.50 above the cost for every container of fruit. Tipco's fruit sales increased substantially as a result of its relationship with Magruder's, but Magruder's fell behind in payments. Crandall then approached Spinale and requested payment of a twenty-five cents per package "brokerage fee." Spinale complied and payments totalling $38,000 were made to Crandall between June and November, 1988.

In August and October, 1988, United States Department of Agriculture ("USDA") Investigator James Bright conducted an investigation of Tipco's competitor, Sid Goodman & Co. ("Goodman") and discovered that Goodman was paying a twenty-five cents per package fee to produce buyers from Magruder's and Fresh Value stores, including Crandall. This investigation led to information implicating Tipco and an investigation of Tipco revealed similar payment by Tipco to Crandall. Spinale characterized the payments as a "brokerage fee" during his conversations with Bright, but admitted that he knew Crandall was not a broker and that Crandall never submitted brokerage bills. Spinale also stated that he saw nothing wrong with making the payments because they came out of Tipco's dollar profit margin.

Several months after the conclusion of Bright's investigation, the USDA filed a formal complaint against Tipco charging a violation of § 2(4) of the PACA, 7 U.S.C. § 499b(4). At an administrative hearing, Stanford Steppa, Crandall's supervisor, testified that he had suspected that "something shady was going on," but nonetheless backed Crandall "100 percent" and instead that he was unaware of the payments. Crandall was subpoenaed by Tipco but failed to appear. At the conclusion of the hearing, the Administrative Law Judge ("ALJ") concluded that no violation of the PACA was stated, finding

that Magruder's became aware of the payments from Tipco to Crandall in August or September of 1988, but allowed the payments to continue. The ALJ determined that Steppa's testimony to the contrary was not credible.

The JO reversed the ALJ's decision on appeal and ordered revocation of Tipco's license, relying heavily upon the Secretary's earlier decision, *In re Goodman & Co.*, 49 Agric. Dec. —— (Sept. 26, 1990), *aff'd., Sid Goodman & Co. v. United States*, No. 90-2209 (4th Cir. Oct. 1, 1991) (unpublished). The JO found that Tipco made payments to Crandall to induce him to purchase more produce, that Magruder's was unaware of the payments, that Crandall was not authorized to receive such payments, and that the payment constituted willful, flagrant and repeated conduct, thus, supporting license revocation. This appeal followed.

II.

This Court must review the entire administrative record to determine whether the agency's final decision is supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938).

Tipco's conduct in making payments to Crandall was found to violate the first and third clauses of the PACA provision, 7 U.S.C. § 499(b)(4).[1] Specifically, the JO determined that the invoices given to Magruder by Tipco violated the first clause of the statute by reflecting prices higher than those charged to other customers and by failing to specify that twenty-five cents of the profit on each package was paid to Crandall. The JO also found that

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[1] The pertinent clauses make it unlawful to: (i) make false or misleading statements for a fraudulent purpose in connection with a perishable agricultural commodity transaction, and (iii), "fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction." *Id.* at § 499(b)(4).

Tipco breached its duty of fair dealing by engaging in commercial bribery and by failing to report Crandall's requests for "brokerage" payments to Magruder's, which it had an affirmative obligation to do. In reaching these conclusions, the JO found that Steppa was unaware of the kickbacks to Crandall [2] and that Magruder's policy prohibited Crandall's receipt of gratuities.

We find that the JO's decision is supported by substantial evidence. Although that decision directly contradicted the findings of the ALJ, the possibility of reaching two different conclusions does not prevent the agency's findings from meeting the substantial evidence test. *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 620 (1956); *see also Universal Camera Corp.*, 340 U.S. at 496 (substantial evidence test applies even where the agency and the ALJ reach contradictory conclusions). In such a situation, however, the agency must provide reasons for its departure from the ALJ's findings. *Citizens State Bank v. FDIC*, 751 F.2d 209, 214 (8th Cir. 1984). The reasons for departure in this case are apparent on the face of the JO's opinion and turn on the JO's differing interpretation of the evidence regarding Magruder's knowledge, or lack thereof, of the payments to Crandall. On this record, there is substantial evidence, including Steppa's own testimony, to support the JO's conclusion that Magruder's was unaware of the payments, thus supporting the conclusion that the payments violated the PACA.

The JO's decision is also consistent with our recent opinion in *Sid Goodman & Co. v. United States*, No. 90-2209 (4th Cir. Oct. 1, 1991) (unpublished), in which we affirmed the agency's determination on very similar facts that Goodman's twenty-five cents per package payments to

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[2] The JO noted that Steppa challenged Crandall's earlier conversion of a television set and also cited Steppa's expression of shock when approached by USDA investigators about Goodman's kickbacks to Crandall.

Crandall and other produce buyers violated the PACA's implied duty to deal fairly with competitors. *Id.*, slip. op. at 8. We further held that invoices which did not reflect the payments were "false statements" within the meaning of the PACA and that Goodman's conduct was sufficiently willful to support license revocation. *Id.*, slip op. at 11, 12.

We find no reason to depart from *Goodman* on the facts of this case. Many of the same actors are involved and the conduct in question occurred in the same produce market. The courts must afford deferential treatment to an agency's construction of a statute which Congress entrusted to its administration, *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). We affirm the JO's determination that Tipco's conduct violated the PACA.

We also affirm the JO's imposition of license revocation as a penalty. Willful, flagrant, or repeated conduct warrants license revocation. 7 U.S.C. § 499h(a). "Willfulness" is an "intentional misdeed" or an equivalent "gross neglect of known duty." *Sid Goodman & Co.*, slip op. at 12 (quoting *Hutto Stockyard, Inc. v. USDA*, 903 F.2d 299, 304 (4th Cir. 1990)). Violations which do not occur simultaneously must be considered "repeated." *See Zwich v. Freeman*, 373 F.2d 110, 115 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). In this case, the payments to Crandall were made regularly over a period of several months. The agency has wide latitude in selecting appropriate penalties, *Butz v. Glover Livestock Comm'n, Co.*, 411 U.S. 182, 185-86 (1973), and we find that license revocation was not inappropriate.

Accordingly, we affirm the agency's decision finding a violation of PACA and revoking Tipco's license, as reflected in the opinion of the JO.

AFFIRMED

APPENDIX B

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. D-89-528

IN RE: TIPCO, INC.,
Respondent

DECISION AND ORDER

[Filed Feb. 6, 1991]

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge James W. Hunt (ALJ) filed an initial Decision and Order on April 9, 1990, dismissing the complaint and amended complaint which seek to revoke respondent's license for reporting, accounting and payment violations arising out of respondent's surreptitious payments to the buying agent of respondent's customer.

On May 10, 1990, complainant appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] Respondent

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[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1989 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was

filed a reply on July 5, 1990. On July 10, 1990, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the case has been fully briefed and oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the entire record, respondent's license is revoked, as requested by complainant.

This proceeding differs in no meaningful way from the recently-decided *Goodman* case (*In re Sid Goodman & Co.*, 49 Agric. Dec. —— (Sept. 26, 1990), *appeal docketed.* No. 90-2209 (4th Cir. Oct. 25, 1990) (attached as an Appendix hereto)). *Goodman* featured most of the same individuals, e.g., Messrs. Crandall and Steppa of Magruder's, Inc., and the same USDA witnesses. An examination of the record herein shows the respondent, Tipco, Inc., committing the same violations as its local competitor, Sid Goodman & Co., in the same time frame, with the same Magruder's employee, Mr. Crandall. The *Goodman* decision holds that a licensee commits a violation of an implied duty under § 2(4) of the Perishable Agricultural Commodities Act when it corrupts the employee of its customer by making surreptitious payments to the customer's buying agent.

Respondent contends on appeal that the evidence does not adequately support the allegations of the complaint, but the examination of the record, as set forth below, in this proceeding reveals that complainant has shown much

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appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisons of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

more than a preponderance of the evidence to support the allegations of the complaint, which is all that is required.[3]

Background

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the "PACA"), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), ("Regulations"), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary of Agriculture (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice").

The proceeding was instituted by a complaint filed on April 28, 1989, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, and an amended complaint filed on September 8, 1989. The complaints allege that respondent, Tipco, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making payments to William Crandall, an employee of Magruder's, Inc., a customer of Tipco's, without notifying Magruder's, to induce Crandall to purchase produce from Tipco. Respondent Tipco filed answers to the complaint and amended complaint denying that it violated the PACA.

A hearing was held on October 19-20 and November 22, 1989, in Baltimore, Maryland. Complainant was represented by Edward M. Silverstein, Esq. Respondent was represented by M. Albert Figinski, Esq., and Stuart B. Berger, Esq. Briefs were filed by counsel for both parties.

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[3] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

Respondent Tipco, Inc., a PACA licensee, is a wholesale supplier of produce located in the Maryland Wholesale Produce Market in Jessup, Maryland. One of its customers is Magruder's, Inc., a retail food store chain with stores located in Washington, D.C., and in nearby Maryland and Virginia. Tipco sold produce to Magruder's from 1981 until December 1988.

Tipco is managed by Frank Spinnale, a part owner of Tipco. Magruder's is managed by its executive vice president, Stanford Steppa, who is part owner of Magruder's. From the early 1980's until late 1988, the buyer for Magruder's produce was William Crandall, who reported directly to Steppa but who, according to Steppa, "ran the produce department from A to Z. That means he bought everything and he was in charge of selling everything. He was in charge of percentages. He was in charge of advertising. He was in charge of everything around the clock, and twelve months a year—on vacation and off vacation.... He was the best in the market.... He was a super produce man. He knew more about produce than I did and I was born to the produce business" (Tr. 244, 271, 301). Steppa and Crandall, who had adjoining offices, talked together about produce 5 to 10 times a day (Tr. 268, 297).

Until 1988, Magruder's, through Crandall, bought only tomatoes, potatoes and onions from Tipco, which was one of several produce dealers with whom Magruder did business. Spinale testified that Tipco sold this produce to Magruder's and its other customers "for whatever markup we could get" and that the quality and price, of the same type of produce, such as lettuce, varied according to the part of the country it came from. It was the practice of suppliers such as Tipco, to sell produce, as Steppa was aware, to different grocers at different prices (Tr. 270, 449, 475, 597). However, the documentary evidence is consistent that Tipco charged its other customers 25¢ less than Magruder's for the same items (CX 6, 10A; Tr. 169-81, 229-30, 491-582).

Around January 1988, Crandall asked Spinale to get a price on Sunkist lemons and oranges, which were produce that he had not previously bought from Tipco. Crandall told Spinale that "he wanted the best and Sunkist has one of the best reputations." Spinale got a price, which Crandall accepted, and Tipco got the order (Tr. 474-476).

Crandall insisted that all produce he bought be the best quality, which reflected Steppa's business policy that Magruder's be known for its quality produce (Tr. 271, 449, 475).

Crandall followed up soon after his order for oranges and lemons with orders for apples and other fruits that he had not bought from Tipco before. According to Spinale, Crandall told him that "everything was going good, that the quality was good, and that everybody was happy. Then he started giving me a bigger list." However, although Tipco's business volume with Magruder's grew substantially in 1988, Tipco still had to compete with other suppliers. Spinale told Crandall that he could not afford to sell to Magruder's for less than $1.50 a package above its costs for the fruit. He said that it cost 50¢ to transport the fruit to Magruder's stores. The remaining $1.00 would be Tipco's gross profit per package. Crandall responded that this pricing arrangement seemed fair, and respondent and Magruder's entered into an agreement that Magruder's would pay respondent a gross profit of $1.50 above respondent's cost for each container or package of fruit it brought from respondent. Thereafter, Crandall, in Spinale's words, "kept giving me a bigger and bigger list of more stuff to buy" (Tr. 472-481).

Meanwhile, Magruder's was slow (a month or longer) in paying Tipco for the produce it bought. By June 1988, Magruder's owed Tipco $276,0000 (which debt was to grow to over $340,000 by the end of that year) (Tr. 482, 489). Magruder's was then Tipco's major account,

giving respondent between $30,000 and $80,000 a week in business (Tr. 557-58).

Then, in June 1988, Crandall came to Spinale and, according to Spinale, demanded that Tipco start paying him 25¢ brokerage for each package of produce he bought from Tipco. Spinale said he was "stunned" by Crandall's announcement and took the demand to mean that he had to pay the 25¢ "or else" have no business. He decided to pay Crandall the money because of the $276,000 that Magruder's owed Tipco at the time and because he wanted the business (Tr. 481-84).

Spinale told Crandall to give Tipco a "brokerage" bill and that Tipco would pay by check; but Crandall never actually submitted any bills for "brokerage" (Tr. 569). Spinale then met with Tipco's office manager, Helen Fridy, and its bookkeeper, Sheila Lawrence, and "told them that we had to keep account of all of the packages that Bill Crandall bought the following week for brokerage" (Tr. 483). Lawrence, who had worked for a produce dealer called Sid Goodman, which was also one of Magruder's suppliers, told Spinale that Crandall was also paid a "brokerage" fee by Goodman. Spinale said that when he learned this he figured that it was a common practice and that Crandall's status with Magruder's must have changed to broker "or something." But he admitted that he knew that Crandall was not really a broker. He also did not tell Steppa about the payments (Tr. 483-484).

Thereafter, Crandall was paid his "brokerage" by check each week based on the number of packages Magruder's bought, again, without any formal "brokerage" bills to Tipco. The payments were nevertheless recorded by Tipco as brokerage on its books. His "brokerage" payments came to over $38,000 (Tr. 109-110).

Spinale testified that Tipco absorbed the 25¢ that it paid Crandall in its $1.50 gross profits. Tipco's bookkeeper, Lawrence, also testified that the 25¢ came out of

Tipco's profits (Tr. 138-139). However, substantial documentary evidence was presented at the hearing, based on Complainant's Exhibits 6 and 10A showing that Tipco passed on the 25¢ to Magruder's by marking up its produce by 25¢ more than it charged all its other customers (Tr. 169-81, 229-30, 491-582). At times, Tipco got less than a $1.50 mark-up on produce it sold to Magruder's, but this was not the norm. Spinale testified that Tipco charged Magruder's under a different pricing scheme (market price) for tomatoes, potatoes and onions sold prior to 1988, than for western-origin fruit sold Magruder's in 1988 (cost + $1.50) (Tr. 534-37). This obfuscatory testimony does not refute the documentary evidence (Tr. 535). Rather, the preponderance of the evidence of record indicates that Tipco was passing on the 25¢ to Magruder's (Tr. 491-576).

Steppa denied knowing that Crandall was receiving payments from suppliers. Magruder's had a written policy prohibiting its buyers from receiving gifts or gratuities (CX 8). Buyers were supposed to report such matters to Steppa, but Steppa said that Crandall never reported receiving any payments (Tr. 245). Crandall was challenged by Steppa, however, about personal conversion of a television set, given in a peach promotion by the South Carolina Peach Board (Tr. 245-50).

Steppa testified that the first time he learned that Tipco was paying Crandall 25¢ a package was when the "bomb hit" in November 1988 (Tr. 249). This came about as a result of an investigation by USDA's PACA Branch of the payments to Crandall by Sid Goodman & Co. Investigator James Bright, a marketing specialist, and James Frazier, assistant branch chief, met with Steppa on November 30, 1988, to talk to him about the investigation.

According to Bright, Steppa appeared "shocked" when told about Goodman and "just blurted out, 'well, if this is going on with Sid Goodman, then it must be going on

at Tipco, also'" (Tr. 63). Steppa said he made this statement because of the large purchases being made from Tipco which he said "was very strange. A lot of things had took place. But, it just had to be." When asked what he meant by other "things," he replied, "pricing of merchandise" and the "responses" he got from Crandall (Tr. 252).

Bright identified Steppa as the Magruder's official he spoke to on November 30, 1988 (Tr. 30); but, that other Magruder's people came into the room (Tr. 60). In his report, Bright said the "[p]rincipals of Magruder's stated their belief that a possible unauthorized payment referred to as 'brokerage' was being paid to their produce manager, Mr. William Crandall, by Tipco, Inc." (CX 9).

The day after the investigators appeared, members of Magruder's, including Steppa, and the company attorney, confronted Crandall. According to Steppa, Crandall first denied taking money, and then admitted it, saying he deserved it:

> Q. [Mr. Silverstein.] He deserved the payment?
> A. [Mr. Steppa.] He deserved the money, and it was his.
> Q. Did he say why he deserved it?
> A. At that point, Mr. Silverstein, it was such a turmoil in that office after that little speech he made, that I really can't tell you what happened after that. It was absolutely chaos (Tr. 259).

Crandall then apparently walked off the job (Tr. 258-259).

The investigation of Tipco by Frazier and Bright included talking to Steppa and Spinale, but no attempt was made to contact Crandall. Complainant made its prima facie case without Crandall's testimony, and it became respondent's burden to produce Crandall for any affirmative defense.

Crandall did not testify at the hearing. Tipco's counsel attempted to subpoena him, but by the time of the hearing his employment with Magruder's was terminated. He was "on the lam" and could not be found to be served (Tr. 418). There are no proper negative inferences to be drawn either because complainant did not produce Crandall, or because respondent was unable to subpoena Crandall.

Findings of Fact

1. Respondent Tipco, Inc. (hereinafter "respondent" or "Tipco"), is a corporation whose mailing address is P.O. Box 466, Jessup, Maryland 20794. Tipco is physically located at Units 54-56 and 113, Maryland Wholesale Produce Market, Jessup, Maryland 20794 (Complaint and Amended Complaint, ¶¶ 1, 2; Answer and Amended Answer, ¶¶ 1, 2; Tr. 119, 503).

2. Pursuant to the licensing provisions of the PACA, license number 791844 was issued to respondent on August 8, 1979. This license has been renewed annually and is next subject to renewal on or before August 8, 1991 (Complaint and Amended Complaint, ¶ 3; Answer and Amended Answer, ¶ 3; Tr. 31-32; CX 1).

3. Mr. James Bright, a marketing specialist employed by the PACA Branch, was assigned to investigate a reparation complaint filed against Sid Goodman & Co. ("Goodman"), a produce dealer located on the Jessup, Maryland, Wholesale Produce Market. During the course of his investigation, Mr. Bright found that Goodman had been making payments to employees of two of its customers. After discussing this matter with his supervisors, Mr. Bright and Mrs. Kathy Feiffer, another employee of the PACA Branch, were directed to conduct a further investigation of Goodman's records to determine the extent of these payments (Tr. 29).

4. During the course of their investigation, Mr. Bright and Mrs. Feiffer found evidence that Goodman had made payments to William Crandall ("Crandall"), an employee

of Magruder's, Inc. ("Magruder's"), who had been delegated the authority to make produce purchases on its behalf, in order to induce Crandall to purchase perishable agricultural commodities from it on behalf of Magruder's without informing Magruder's that it was making these payments (Tr. 29, 440).

5. In discussing the above matter with Mr. Stanford Steppa, vice president of Magruder's, Mr. Bright and Mr. James R. Frazier, Assistant Chief, PACA Branch, Fruit and Vegetable Division, AMS, were told that, if Crandall was receiving payments from Goodman, he also must be receiving payments from Tipco. In support of this allegation, Mr. Steppa stated that phone conversations between Crandall and Mr. Frank Spinale, the person who had the responsibility for the day-to-day business affairs of Tipco, appeared to be furtive and Crandall appeared to have drastically increased the amount of produce he was buying from respondent (Tr. 29-32, 47-48, 62-67, 88-89, 195-96, 198, 249, 252, 277-79, 322, 359-61, 410-11, 470, 496-97, 511-12).

6. Subsequent to the conversation with Mr. Steppa, Mr. Bright and Mrs. Feiffer were instructed by their supervisors to investigate respondent. The investigation took place during the period December 12-19, 1988 (Tr. 32-33).

7. On numerous occasions, during the period June through November 1988, respondent made payments to Crandall totalling more than $38,000 in order to induce him to purchase perishable agricultural commodities from it on behalf of Magruder's (Tr. 33-55, 69-70, 120-25, 127-28, 188; CX 2, 3, 5).

8. Magruder's has a firm policy prohibiting employees from taking gifts or gratuities of any kind from vendors, and did not know that its employee was receiving the payments referred to in ¶ 7, above, from respondent (CX 8; Tr. 245, 281-83).

9. Crandall did not inform his employer that he was receiving a payment of 25¢ per package for the produce he purchased from respondent on its behalf (Tr. 245, 248, 256, 297, 565).

10. Respondent did not inform Magruder's that it was paying Crandall 25¢ per package for the produce which Crandall purchased from it on Magruder's behalf (Tr. 193, 257, 554).

11. Crandall was not authorized by Magruder's to demand, to ask for, or to accept the 25¢ per package payments from respondent (Tr. 258).

12. There is no evidence in the record or even a bare allegation from respondent that Crandall did anything, other than to purchase produce from respondent on behalf of his employer, to earn the payments referred to in ¶ 7, above.

13. The acts of respondent in making payments to Crandall, to induce him to make purchases from it on behalf of his employer as more specifically alleged in ¶ 7 of the Complaint as well as in ¶ 7 of the Amended Complaint, constitute willful, flagrant and repeated violations of section 2 of the PACA (7 U.S.C. § 499b).

Law and Regulations

Section 2(4) of the PACA (7 U.S.C. § 499b) provides that:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> . . . .
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought

> or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. . . .

7 C.F.R. § 46.26 of the Secretary's regulations provides:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

Discussion

The two substantive issues presented are, first, whether the respondent violated section 2(4) of the PACA by making false statements to Magruder's in connection with transactions, in interstate commerce, involving perishable agricultural commodities and, secondly, whether the respondent violated section 2(4) of the PACA by failing to perform an explicit or implicit duty it owed to Magruder's.

Respondent Violated the PACA.

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful, in pertinent part, for any commission merchant, dealer, or broker [4] to make, for a fraudulent purpose, any false or misleading statement in connection with produce transactions, and to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with produce transactions. Complainant alleges that the respondent violated the PACA by making false statements for a fraudulent purpose in connection with produce transactions and by failing to perform an express or implied duty, arising out of the sale of produce, which it owed its customers. The respondent, at the hearing, did not deny that it made the payments which serve as the basis for the complainant's allegations that it violated the PACA, but has asserted that its actions did not violate the Act.

The record reflects that respondent entered into an agreement with Crandall, an employe of Magruder's who had been delegated the responsibility for purchasing produce on Magruder's behalf, whereby respondent agreed to pay Crandall 25¢ per package for the produce which he purchased from respondent on Magruder's behalf.[5] The facts that the respondent made this agreement and these payments are beyond dispute.[6] Respondent's records and

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[4] These terms are defined in 7 U.S.C. § 499a(5), (6) and (7).

[5] CX 2; Tr. 481-85.

[6] Respondent claims that these payments were "extorted" by Crandall, however, it has presented no evidence to substantiate this charge. Rather, the evidence indicates that Frank Spinale, respondent's manager, did not begin to pay Crandall these amounts until after he was told by one of his employees that Goodman already was making similar payments to Crandall (CX 9; Tr. 96, 105-06). In any event, even if Crandall solicited the payments from the respondent, and even if the respondent felt compelled to make those payments in order to keep Magruder's business, this neither excuses its

the testimony of its employees at the hearing clearly and irrefutably establish this point.[7] Under these circumstances, all that is left to decide is whether the making of these payments violated the PACA.

As more fully discussed below, I find that the respondent's activities violate the prohibitions of section 2(4) of the PACA (7 U.S.C. § 499b(4)) as alleged in the complaint.

Respondent Violated the PACA By Making False Statements on Its Invoices to Its Customers.

The complainant has alleged and proven by at least a preponderance of the evidence (see note 3, *supra*) that respondent violated the PACA by making false statements to Magruder's on the invoices which respondent sent to Magruder's. The supporting documentary evidence on this point consists of the prices contained on those invoices (CX 4) in comparison with the prices which respondent was charging other customers (CX 4, 6, 10A; Tr. 171-81). On the invoices it sent to Magruder's, the amounts which respondent entered as sales prices failed to indicate that respondent was recapturing the 25¢ per package payments which it was making to Crandall from Magruder's. The record clearly establishes that this 25¢ was not a portion of the sales price it was charging to Magruder's because the prices it charged other customers was 25¢ less than that charged Magruder's. *See* Tr. 171-84, 530-32, 543, 549, 566; CX 6, 10A. Furthermore, Magruder's and respondent had entered into an agreement that Magruder's would pay a gross profit of $1.50 above respondent's cost for each container or package of fruit (Tr. 479-81), which agreement was violated by increasing the sales price an additional 25¢ per package or container. This, too, made the invoices prices false and misleading.

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violations nor mitigates the sanction, as is more fully explained, *infra*.

[7] *See* CX 3, 6.

Respondent Violated the PACA By Failing to Perform An Explicit or Implicit Duty It Owed to Magruder's.

Nothing discussed so far is new to this area of law.[8] The second area for discussion—whether the respondent violated the PACA by failing to perform an explicit or implicit duty it owed to Magruder's—does present a novel issue. Other than the compansion case to this one, *In re Sid Goodman & Co.*, 49 Agric. Dec. —— (Sept. 26, 1990), *appeal docketed*, No. 90-2209 (4th Cir. Oct. 25, 1990,), the annals of the PACA do not contain any record of such cases. The testimony of USDA witness James R. Frazier indicates that, *prior to these two cases, the Department has never had sufficient evidence of such a violation on which to proceed.*[9] Thus, it must be concluded that, until now, the Secretary has not formally considered whether the activities of a licensee, such as those involved here, constitute a failure to perform an explicit or implicit duty owed to a buyer.[10]

The history of the PACA since its inception, however, leads me to conclude that respondent has violated the Act as alleged. The totality of the history of the PACA supports a conclusion that members of the produce industry have an obligation to deal fairly with one another—a duty to only deal with one another at arm's length [11]

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[8] *See, e.g., In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, *aff'd sub nom. Harry Klein Produce Corp. v. U.S. Dept. of Agriculture*, 831 F.2d 40 3(2d Cir. 1987); and *In re Scalise*, 12 Agric. Dec. 1105 (1953).

[9] Tr. 325-26, 386-88.

[10] It also would be fair to say that, in enacting the 1942 amendment to the PACA, which resulted in the subject unnumbered clause being added to subsection 2(4), the Congress did not consider the possibility that a person acting subject to the PACA would violate it by attempting to corrupt, or actually corrupting, the employee of a customer or a supplier. *See* H.R. Rep. No. 1840, 77th Cong., 2d Sess. (1942).

[11] For example, on numerous occasions, the Judicial Officer has held that a renegotiated contract was voidable when a party to it

(Tr. 395). Included within this obligation is the positive duty to refrain from corrupting an employee of a person with whom it is dealing, *e.g.*, each PACA licensee is obligated to avoid offering a payment to a customer's employee to encourage the employee to purchase produce from it on behalf of his employer [12] (Tr. 330, 412). On the other hand, if the employee seeks a payment from the licensee,[13] the licensee is affirmatively obligated to

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withheld a material fact he was bound to disclose. *Hastings Potato Growers Ass'n v. M. Singer's Sons*, 20 Agric. Dec. 734 (1961); *Bruce Church, Inc. v. O'Day*, 31 Agric. Dec. 676 (1972). Moreover, even though the parties to a transaction may negotiate settlements after the receiver defaults on payment, such an agreement is not considered to be "full payment" for disciplinary purposes because the shipper may not have had any choice in agreeing to the terms offered by the receiver. *See In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396 (1981), *aff'd sub nom. United Fruit & Veg. Co. v. Dir. of Fruit & Veg. Div.*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); and *In re The Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138 (1981):

> There is a sound basis for the regulatory requirement that agreements to extend the time for payment be made at the time the contract is made. After the buyer has the produce, the parties are no longer dealing on equal terms. The seller can no longer refuse to sell; the buyer is the only one with options, *i.e.*, he can pay or not pay, as agreed. Thus the buyer would have an unfair advantage in any negotiations on payment terms after delivery. *In order to ensure that the parties deal on equal terms, the regulations prohibit changes after the contract is made.* [Emphasis supplied].

Also *see* the comments of James R. Frazier at Tr. 330: "The PACA establishes a level playing field on which traders can trade in the fruit and vegetable industry with confidence. And this is really necessary in this industry considering the perishable nature of the commodities and the distance in which transactions are traded."

[12] I do not reach the question whether it would be permissible for the licensee to make the offer if it had permission from the buyer's employer.

[13] In ¶ 7 of both respondent's Answer and its Amended Answer, it claims that these payments were exorted from it by Magruder's. However, the record does not show any evidence supporting this claim. Thus, there is no evidence on which we may conclude that

report that request to its customer, could only make payments with the customer's permission,[14] and, even then, would risk violating PACA with anything more than a *de minimis* payment (e.g., more than a pen, calendar or lighter).

While the Department has not issued regulations specifically setting forth these requirements,[15] and while the Congress has not considered similar facts and indicated in legislative history that such activity as is involved here ought to be considered to be a violation of the PACA, it nonetheless is clear that the kind of activity involved here is corrupt and that it is readily perceivable as being evil.[16] *See, e.g.*, Administrative Law Judge William J. Weber's comments (as adopted by the Judicial Officer) in *In re National Beef Packing Co.*, 36 Agric. Dec. 1722, 1728-29 (1972), *aff'd sub nom. Nat. Beef Packing Co. v. Secretary of Agriculture*, 605 F.2d 1167 (10th Cir. 1979):[17]

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respondent's allegation has any merit. *See United Fruit & Veg. Co. v. Dir. of Fruit & Veg. Div.*, 668 F.2d 983, 984-85 (8th Cir. 1982). And, *see* further discussion of exortion defense, *infra*.

[14] Tr. 412-16. Complainant's witness Frazier testified that there is an affirmative duty under PACA to divulge the request for payment no matter who absorbs the cost. I agree.

[15] C.F.R. § 46.26, quoted above, advises licensees that even though it is impracticable to specify all of their duties in detail, they are, nonetheless, required to perform any express or implied duty.

[16] Such a practice was described as "secret and corrupt" in 1939. *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939).

[17] Further, *see United States v. Acme Process Co.*, 385 U.S. 138 (1966). Congress has recognized that a vendor's action in making payments to a customer's employee is inherently evil and has outlawed them in the government procurement process; *Perrin v. United States*, 444 U.S. 37 (1979): while bribery of private parties, sometimes referred to as commercial bribery, was not considered as a crime under the common law, it is sufficiently established as an evil so as to be covered by the Travel Act, 18 U.S.C. § 1952, which

Commercial bribery is considered unfair and prohibited by the courts and administrative agencies because of its actual and possible effects on competition in the marketplace. An individual or company which makes payments to the employee of another to influence buying

> . . . interposes an obstacle to the competitive opportunity of other traders which is in no way related to any economic advantage possessed by him. It is the inevitable consequence of commercial bribery, as it is also with other unfair business practices, that competitors will adopt similar tactics to procure business. No matter what the character of the competitor's goods, as far as quality is concerned and in the matter of price, such an organization will find it extremely difficult, if not impossible, to sell, the goods upon the basis of their quality and price alone, in the presence of the competitor's entertainment policy . . . 2 Callman *The Laws of Unfair Competition Trademarks and Monopolies* § 49 (3d ed. 1968).

Also *see* Chief Administrative Law Judge John A. Campbell's decision (as adopted by the Judicial Officer) in *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1043

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makes it unlawful to travel or use a facility in interstate commerce to commit, *inter alia*, bribery in violation of the law of the State in which committed; *Ideal Plumbing Co. v. Benco, Inc.*, 529 F.2d 972 (8th Cir. 1976): In enacting § 2(c) of the Clayton Act as it is amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(c), Congress indicated that price arrangements equivalent to illicit brokerage, such as commercial bribery, were contrary to public policy; and *British Am. & Eastern Co., Inc. v. Wirth, Ltd.*, 592 F.2d 75 (2d Cir. 1979): An agent's contract action for compensation from his principal can be defeated if the principal shows that the agent breached his trust by accepting from the principal's customers, without the principal's knowledge, monies intended to influence the agent's actions concerning a matter affecting the principal's interests.

(1986), *aff'd and remanded sub nom. Holiday Food Service, Inc. v. Dep't of Agriculture*, 820 F.2d 1103 (9th Cir. 1987) (remanded to determine respondent's ability to pay the penalty):

> Commercial bribery offends both morality and the law. It is an evil which destroys the integrity of competition, the heart of commerce, by poisoning the judgment of the people who make business decisions. Bribed purchasing agents do not make their decisions based solely on the comparative merits of competing products available in the marketplace. Their distorted judgment inevitably disadvantages competing products untainted by bribes. The only way the disadvantaged can compete is to offer a bigger bribe, since it becomes difficult, if not impossible, to compete on the basis of price, quality or service. Unchecked, the practice can spread through the market, destroying fair competition everywhere.

Further *see* Ross, *How Lawless Are Big Companies?*, Fortune, Dec. 1980 (domestic ed.), at 56.[18]

It is also clear that in enacting the PACA, the Congress intended to establish a code of fair dealing.[19] Based

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[18] Judge Weber, writing in *In re National Beef Packing Co., supra*, 36 Agric. Dec. at 1729, quotes a Packers and Stockyards Administration witness as having testified as follows: "It seems to me that the person making the bribe has kind of the inside track on the business and can exclude competitors because of his relationship with the buyer." The same could well have been said in this case.

[19] *See* H.R. Rep. No. 1041, 71st Cong., 2d Sess. 2 (1930):

> The effective control of . . . unfair and unethical practices, such as false accounting and failure to pay on the part of commission merchants for produce entrusted to them for disposition, the circulation of fictitious and misleading market quotations in connection with soliciting of consignments, making false reports concerning the quality and condition of products, and the making of fraudulent charges in connection with marketing services by commission merchants, dealers, and brokers are problems of long standing. These problems are of equal

on this, I must conclude that the defense relied upon by respondent—that it didn't know that paying its customer's employees to purchase produce from it, without notifying the customer, would violate the PACA—has very little merit. For example, the implication in Spinale's testimony, that he considered this payment to be a "brokerage" (Tr. 484-85), is just not credible. (Spinale's many years of experience in the produce business negates this possibility.) In similar circumstances in a case brought pursuant to the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.*, *In re Hygrade Food Prods. Corp.*, 26 Agric. Dec. 825, 831 (1967), the Judicial Officer stated: "We

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interest and seriousness to the farmer, the honest dealer, and the cooperative marketing association.

. . . .

. . . It is believed that the regulation of interstate commerce transactions of commission merchants, dealers, and brokers as provided in this bill will provide an effective means of suppression and control of the fraudulent practices of which so much complaint is heard. The honest commission merchant, dealer, and broker who now, individually or through his trade association, vigorously condemns these sharp practices will welcome the protection afforded by this bill. The dishonest and unscrupulous operator will be required to conduct his business according to long-established principles of honesty and fair dealing or engage in some other calling.

Also *see* S. Rep. No. 1122, 81st Cong., 1st Sess. 2 (1949):

The Perishable Agricultural Commodities Act, 1930, has, for twenty years, aided in suppressing fraudulent and unfair practices in the marketing of fruits and vegetables in interstate or foreign commerce. Its activities have become an integral part of the marketing of fruits and vegetables, and it has the unanimous support of both producers and handlers in the fruit and vegetable industry.

Further, *see* H.R. Rep. No. 543, 98th Cong., 1st Sess. 3 (1983):

The Perishable Agricultural Commodities Act was enacted in 1930 to encourage fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudulent practices in the marketing of fresh and frozen fruits and vegetables and cherries in brine. . . .

Also see the comments of James R. Frazier at Tr. 392.

think respondent's explanation that it merely was paying what it considered to be a legitimate broker is incredible under the circumstances." The same is true of Spinale's testimony in the instant case.

Respondent's Violations of the PACA Are Willful, Flagrant and Repeated.

The numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 373-74 (5th Cir. 1980); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub nom. George Steinberg & Son, Inc. v. Butz, supra*, 491 F.2d at 988.[20] Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the requirements of a statute. *In re Shatkin*, 34 Agric. Dec. 296 (1975); *In re George Steinberg & Son, Inc., supra*, 32 Agric. Dec. at 263-69; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961).[21] Respondent knew or should have known that making these payments to induce Crandall to make purchases from it was unlawful, and should have known

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[20] See, also *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) *cert. denied*, 389 U.S. 835 (1967); *Reese Sales Co. v. Hardin*, 458 F.2d 183 (1972); *Atlantic Produce Co., supra*, 35 Agric. Dec. at 1631, *In re J.H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709 (1978):

> Respondent's violations are *malum prohibitum*—not *malum in se*. Accordingly, there is no inconsistency between the finding that [respondent] conducted himself responsibly and honorably, and the finding that respondent's failure to pay over $48,000 for produce in 73 transactions and $200 in brokerage fees in 20 transactions constitutes repeated, flagrant and willful violations of the Act.

[21] See also, *American Fruit Purveyors, Inc. v. United States, supra*, 630 F.2d at 374: "Under PACA, an action is willful if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements."

that it was violating the law.[22] Respondent clearly disregarded the requirements of the PACA, and respondent's violations were, therefore, willful. *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Kafcsak*, 39 Agric. Dec. 683 (1980), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *reprinted in* 41 Agric. Dec. 88 (1982).

Respondent's Reply to Complainant's Appeal.

Since respondent prevailed before the ALJ, respondent's reply is keyed to arguing that the ALJ committed no errors in reaching the decision to dismiss the complaint and amended complaint. Respondent's main argument is that the ALJ's determinations are entitled to great weight and should not be reversed by the Judicial Officer unless "hopelessly incredible." Thus, respondent argues, variously, that the ALJ did not err in finding no violation of § 2(4) because respondent made no false statements to Magruder's; that complainant's case, based upon § 2(4), is void for vagueness; that, in any event, the payments to Crandall by respondent were extorted; that, lacking the statutorily-prerequisite complaint in hand *before* an investigation could commence, complainant nonetheless investigated respondent and thus has filed a faulty, unfair PACA proceeding; and that revocation based upon the facts of this case would amount to an improper sanction.

I have carefully considered each and every argument in respondent's reply and find each to be without merit.

At this point, it is important to emphasize that the ALJ did make this very important and correct determination (Initial Decision at 20) (emphasis added):

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[22] *See, e.g., Crimes and Offenses Generally*, § 18.2-444, Code of Virginia; 15 U.S.C. § 13(c); 18 U.S.C. § 1952; 53 Am. Jur. 2D *Master and Servant* § 101; 54 Am. Jur. 2D *Monopolies, Etc.* §§ 142, 163 and 799; Annot., 42 A.L.R. Fed. 276 (1976).

The point is not whether commercial bribery should be prohibited in transactions between dealers and their customers, but whether such practices are prohibited by the PACA. It would appear that the PACA is not that broad and that Congress intended that other laws regulate such activity.

However, the Secretary's policy is liberal in giving great weight to proposed interpretations of the law by its constituent agencies. [Footnote omitted.] See e.g., *Jackie McConnell, et al.*, 44 Agric. Dec. 712, 730 (1985); *Eldon Stamper*, 42 Agric. Dec. 20, 49 (1983); *Norwich Veal and Beef, Inc.*, 38 Agric. Dec. 214, 221 (1978). And an argument can be made that even though other laws dealing with unfair commercial activity have primary authority in this field, it is not exclusive authority and that the PACA does cover such matters, as the administrative law judge in the *Goodman* case decided (*Sid Goodman & Company, Inc.*, PACA Docket No. 89-523. February 28, 1990). Therefore, in view of the Secretary's policy and for reasons of comity, *I find that Section 2(4) of the PACA does prohibit commercial bribery in transactions between licensed produce dealers and their customers.*

Moreover, the evidence of record is certain that licensee Tipco made surreptitious payments to its customer's employee to induce the employee to buy, or continue to buy, its produce, certainly, in derogation of its competitors. Under the precepts of the *Goodman* case, this is enough, in itself, for me to find that respondent Tipco deserves the same sanction for the same violation as found in the *Goodman* proceeding.

It is not my intention to answer all of respondent's arguments directly, but a few should be addressed. Complainant's argument that the ALJ's credibility determinations are entitled to great weight by the Judicial Officer is correct.

However, the "hopelessly incredible" standard is misplaced. This applies to the ALJ's credibility determinations, *if adopted by the Judicial Officer*, and is a constraint on the reviewing court, not on the Judicial Officer.

This principle may be demonstrated by language from cases cited by respondent, such as *Mattes v. United States*, 721 F.2d 1125, 1128-29 (7th Cir. 1983) (emphasis added), as follows:

> *A. Substantial Evidence Review*
>
> Our review of the factual findings made by the Secretary of Agriculture is narrow. The Secretary's findings must be sustained if they are supported by substantial evidence which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951) quoting *Consolidated Edison v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216, 83 L.Ed. 126 (1938), quoted in *NLRB v. Berger Transfer and Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982). See also *Swift & Co. v. United States*, 393 F.2d 247, 255 (7th Cir. 1968).
>
> Despite Diane's arguments to the contrary, *the J.O. is not required to accept the ALJ's findings of fact even when those findings are based on credibility determinations.* Administrative Procedure Act ("APA") § 557(b), 5 U.S.C. § 557(b). Rather, as the Supreme Court made clear in *Universal Camera, the agency is free to substitute its judgment for that of the ALJ.* The reviewing court still evaluates the J.O.'s decision using the substantial evidence test with the caveat that "evidence supporting a conclusion may be less substantial when an impartial, experienced [ALJ] who has observed the witness and lived with the case has drawn conclusions different from the Board's than when he has reached the same

conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496, 71 S.Ct. 456, 469, 95 L.Ed. 456 (1951). See also *Kopack v. NLRB*, 668 F.2d 946, 951-52 (7th Cir. 1982).

Thus the ALJ's determinations are not entitled to any special deference from the agency except insofar as the ALJ's findings are based on witness credibility determinations. The agency is free independently to weigh the evidence and draw its own inferences. The ALJ, of course, is best situated to make credibility determinations based on the demeanor of witnesses. *Kopack*, 668 F.2d at 953. [Footnote omitted.] *See generally* 3 K.C. Davis, *Administrative Law Treatise* 327-36 (2d ed. 1980).

The ALJ, finding Diane a credible witness, accepted Diane's statements that she intended to operate independently and did not intend to circumvent the suspension orders. The J.O., without explicitly rejecting the ALJ's findings, reversed on the facts holding "the uncontradicted, objective circumstances [to be] more persuasive than Mrs. Mattes' testimony." J.O.'s Dec. at 21. The J.O. thus inferred from a number of facts and circumstances that Diane's application for registration was part of an attempt to avoid the effects of the suspension. [Footnote omitted.]

This application of *Universal Camera* to a Packers and Stockyards Administration proceeding was based upon the earlier Seventh Circuit case, *Kopack v. NLRB*, 668 F.2d 946, 952 (7th Cir. 1984) (emphasis added), which set forth very clearly the standards of review *vis-a-vis* the court and the agency, as these standards relate to review of an ALJ's findings and conclusions, as follows (emphasis in original):

Framing the issue on review as being "whether the Board erred" is inconsistent with *Universal Camera*. That case establishes the level of scrutiny

which must be applied to a Board decision by a reviewing court. It does not address what, if any, standard of review the Board must apply to an ALJ's determination. It is not the case that the Board must observe the same standard as a court of appeals: "[I]n reviewing questions of fact, a court of appeals has less discretion to overturn an NLRB determination than the NLRB has to reject conclusions of its administrative law judge. '[T]he Board is not bound by findings and conclusions of an administrative law judge and is free to draw its own inferences as well as conclusions when its broader experience and expertise is applicable." *U.S. Soil Conditioning v. NLRB*, 606 F.2d 940, 944 (10th Cir. 1979) (citations omitted). Asking whether the Board "erred" therefore is not only outside the scope of the *Universal Camera* decision; framing the issue in such a manner adds confusion to an area where clear analysis is already difficult. The sole issue before this court is whether there is "substantial evidence" to support the Board's determination.

It is possible that we misconstrue the petitioners' argument and that they contend *this court* is bound to uphold the ALJ's findings because they are supported by substantial evidence. This argument also misstates the law. *Universal Camera* makes clear that it is the Board's decision, rather than that of the ALJ, which is subject to scrutiny by a reviewing court under the substantial evidence test. 340 U.S. at 488, 71 S.Ct. at 464. As the Ninth Circuit stated in *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343 (9th Cir. 1978), "if there is evidence to support each of two conflicting views, the findings of the Board must be allowed to stand despite the fact that we might have reached the opposite conclusion on our own." *Id.* at 1347 (citations omitted).

The "hopelessly incredible" rule is discussed with approval by Professor Davis, who states in Davis, *3 Administrative Law Treatise* § 17.16, at 336 (2d ed. 1980):

> When the agency adopts the ALJ's findings, the task of the reviewing court is normally easier; a common note that is struck is that an ALJ's findings adopted by the agency may not be upset unless it is "hopelessly incredible or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." NLRB v. Dinion Coil Co., 201 F.2d 484, 490 (2d Cir. 1952); International Union v. NLRB, 459 F.2d 1329, 1351 (D.C. Cir. 1972) (Tamm, Jr., concurring and dissenting); NLRB v. Stark, 525 F.2d 422, 425-26 (2d Cir. 1975), cert. denied, 424 U.S. 967 (1976); NLRB v. Columbia University, 541 F.2d 922, 928 (2d Cir. 1976).

However, Professor Davis makes it clear that an agency is in a different position *vis-a-vis* an ALJ's findings of fact based on credibility determinations than a reviewing court. He states (*id.* at 327):

> Because of the provision of § 557(b) that "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision," the agency is entirely free to substitute its judgment for that of the hearing officer on all questions, even including questions that depend upon demeanor of the witnesses, and even despite the hearing officer's observation of the witnesses. The law that had been established before the APA continues: "Even on a question of the credibility of contradictory witnesses, notwithstanding the advantage the examiner has of seeing and hearing them testify, the Board may differ from the conclusion of its examiner." NLRB v. Tex-O-Kan Flour Mills, 122 F.2d 433, 437 (5th Cir. 1941).

Moreover, Professor Davis explains that an agency can overrule an ALJ's findings based on credibility determinations irrespective of whether a very substantial preponderance of the evidence supports the agency's decision. He states (*id.* at 332) that the "orthodox doctrine"

consistent with Supreme Court decisions is set forth in *Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). Quoting from the court's decision rather than the abbreviated version in Professor Davis' treatise (*ibid*):

> The findings of the Commission must be accepted by this court if there is substantial evidence on the record considered as a whole to support them. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). The Commission's overruling of the Law Judge's findings on the credibility of two witnesses is not required to be supported by a very substantial preponderance of the evidence. Federal Communications v. Allentown Broadcasting Corp., 349 U.S. 358, 75 S.Ct. 855, 99 L.Ed. 1147 (1955). And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); *National Macaroni, supra.* If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference. *National Macaroni, supra.*
>
> The Commission must consider the initial decision of the Law Judge and the evidence in the record on which it was based. Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 138 U.S. App.D.C. 152, 425 F.2d 583 (1970). But the findings and conclusions of the Law Judge are not sacrosanct and are not necessarily binding on the Commission or the court; they are part of the record to be considered on appeal. OKC Corp. v. Federal Trade Commission, 455 F.2d 1159 (10th Cir. 1972). When the Law Judge and the Commission reach opposite results, the Law Judge's findings should be considered

> on review and given such weight as they merit within reason and the light of judicial experience. But this does not modify the substantial evidence rule in any way. *OKC Corp., supra.*

Finally, I note that the case cited by respondent for the "hopelessly incredible" argument was one *where the agency had adopted the ALJ's determinations*, and not one where the ALJ was reversed. See, *Conair v. NLRB*, 721 F.2d 1355, 1366-67 (D.C. Cir. 1983).

From the foregoing, it is abundantly clear that the Judicial Officer is not bound by the credibility determinations of the ALJ, and that the standard on court review is whether there is substantial evidence to support the Judicial Officer's contrary decision.

It is also worth noting that the other ALJ in the *Goodman* case saw the identical key witnesses and issues involved here the other way, and *I have already agreed with the Goodman ALJ* (see Appendix). Furthermore, my findings and conclusions are based in large part on documentary evidence and inferences from the facts.

Respondent relies on my statement in *In re Hampshire Open Air-Mkt, Inc.*, 41 Agric. Dec. 955, 957 (1982), that it is the "policy" of the Judicial Officer to reverse an ALJ's findings of fact only where the record "compels" such action (Respondent's Reply at 5-6 (July 5, 1990)). Just as court decisions are, at times, quietly laid to rest without being expressly overruled, I have found it necessary to ignore that "policy" in a number of subsequent cases. It is appropriate, now, to expressly overrule the self-imposed limitation set forth in *Hampshire*.

Respondent's reply argues that section 2(4) was not violated because Tipco made no false statements through its invoicing, because Tipco paid the 25¢-per-package payment to Crandall from what respondent characterizes as "Tipco's pocket" (Respondent's Reply at 8 (July 5,

1990)). However, I do not find that the evidence supports respondent's contention that Tipco itself absorbed this 25¢ per package. Rather, the evidence is consistent that Tipco charged its other customers 25¢ less than Magruder's for the same items. (CX 6, 10A; Tr. 169-81, 229-30, 491-582). In fact, under cross-examination, Tipco's witness, Mr. Spinale, admitted that Tipco charged Magruder's more than other customers, but Mr. Spinale said that it was for competitive reasons. Thus, Tipco has admitted the 25¢-per-package increase, and is really only saying, in effect, that the extra 25¢ charge was not for recouping Crandall's pay-off, but for a legitimate competitive purpose, as follows (Tr. 537-39) (emphasis added):

> MR. SILVERSTEIN: This $1.50, I have not even gotten to that yet, Your Honor. We are just talking about this one single transaction where he was making a 50 cent profit on everybody else but 75 cents of Magruder's. And I still have not heard a single reason why he justified that. And I suggest to you that the reason why he is not doing it is simply because he does not want to say that that quarter was going to Crandall where in fact that is where it went.
>
> MR. BERGER: Your Honor, I move that that be stricken. That is purely a statement and utterance and he is testifying. He has got the witness and it is his floor. But I would expressly ask Mr. Silverstein—
>
> JUDGE HUNT: Again I think that it is a matter of communication at this time. Now you asked about the difference in pricing, and Mr. Spinale refers to the $1.50 arrangement in 1988 to charge Magruder's. Now what is the difference? I thought that you wanted to know how he arrived at the $1.50 he charged Magruder's. You do not want to know that?
>
> MR. SILVERSTEIN: It was not even $1.50 charged to Magruder's in here.

MR. BERGER: I really object and I would ask the Court to admonish him not to testify.

MR. SILVERSTEIN: Your Honor, how can—

JUDGE HUNT: One at a time, please. One at time. Mr. Silverstein first.

MR. SILVERSTEIN: He is objecting to my responding to you. I am telling you if we look here and we go back to the board where we started yesterday with the same transaction, Your Honor, *we have a transaction in which the price was $7.50 and he charged $8 to other people. That is a 50 cent profit. To Magruder's he charged a base price of $8.25 It has nothing to do with the $1.50.*

JUDGE HUNT: You are talking about Complainant's Exhibit 6 now that you are referring to?

MR. SILVERSTEIN: Yes.

JUDGE HUNT: You see what he has on the board there, the $7.50, the $8, and the $8.25, and plus 50 cents before the $8 and plus 75 cents before the $8.25?

THE WITNESS: Yes.

JUDGE HUNT: Now why the difference?

THE WITNESS: Because I think that anybody will understand this, that anybody in business, in the produce business, I do not know about selling nails or screwdrivers, that everybody gets different prices. You do not sell one guy for $5, and another guy for $5, and another one for $5. You get as much as you can get. That is the way that I thought that the American way was.

JUDGE HUNT: *Yes, but you are not being responsive, how did you arrive specifically at those situations that you charged Magruder's more than you charged the others, how did you arrive at that?*

THE WITNESS: I was able to get $8.75 from Magruder's and be competitive where he was competitive and the other guys I got $8 from. It is all I could get. If one guy would pay me $10, I should not have sold them for $10?

BY MR. SILVERSTEIN:

Q. So the buyers for those other three companies were sharper than Crandall, is that right?

A. That is right.

I find that the reason that Tipco was able to get 25¢ more per package from Magruder's was because Tipco was paying Magruder's agent for the additional business. I do not believe that Crandall would just pay more than any other customer of Tipco's, unless Crandall was pocketing the difference. An examination of the documentary evidence reveals that respondent maintained rather consistent pricing to all of its customers. Also, when freight charges (after June 1988) are subtracted, Magruder's consistently paid 25¢ per package more than respondent's other customers. Yet, the ALJ (incorrectly) found that the additional 25¢ was passed on to Magruder's on only two or three occasions. However, it is manifestly clear from the documentary evidence and from the admission by its employees that respondent was recouping the 25¢ it was paying Crandall from Magruder's on a regular basis.

The ALJ's reliance on respondent's employees' testimonial claims that it operated on a formula pricing basis (cost plus $1.50) with Magruder's is misplaced. The documentary evidence which comes from Tipco's own records and was created simultaneously with the transactions should have more credibility and is entitled to more weight.

Moreover, Spinale admitted to the Department's investigators that respondent was recouping from Magruder's the quarter per package it paid Crandall, and even noted it on a document he gave them (Tr. 45-46). Specifically, the Department's investigator testified:

A. He [Mr. Spinale] told me that after June of 1988 that in fact he did ad[d] an extra quarter in that he returned to Mr. Crandall—to Magruder's—in the price to Magruder's.

Q. Mr. Bright, in looking through the Respondent's records, were you able to discover whether or not Magruder's was charged more for produce than other customers of the Respondent?

A. Yes.

Q. And, was it?

A. Yes.

Q. How can you be certain that it was?

A. Well, we did—we went through Respondent's records and went from the invoice price and checked in their accounts receivable to see if, in fact, that was the amount that many of its customers paid. We check that on a lot of customers.

Q. Did you discuss this with Mr. Spinale?

A. Yes.

Q. And, were your figures deemed to be correct? Did you have a discussion with him about how the formula applied?

A. Yes.

Q. Now, earlier you indicated that Mr. Spinale had claimed that the 25 cent per package charge Tipco was paying to Crandall was coming out of Tipco's profits. Did your investigation reflect that this was a true statement?

A. No.

Q. How can you be sure of that?

A. I asked Mr. Spinale. As we went through these lot by lot, sale by sale, I sat with Mr. Spinale and had him explain to me case by case how these prices that he was charging his customers had been arrived at. And he told me that he had figured in this 25 cent per package after June of 1988.

In addition, in Complainant's Exhibit 10A, which is in Spinale's handwriting (Tr. 527), he indicated that respondent priced the produce to Magruder's, as follows:

[Cost]

plus 10% SHRINK
30[¢] LAB[OR]
30[¢] POLY [BAGS]
30[¢] MASTER [BAGS]
50[¢] FR[EIGH]T

\+ 25[¢] AFTER JUNE 88 BROK[ERAGE]

Based on a preponderance of the evidence, I find that respondent was recouping from Magruder's the quarter it was paying Crandall.

Even if respondent were absorbing the quarter per package payment it was making to Crandall, i.e., not charging Magruder's more than it was charging its other customers and not recovering the 25¢ from Magruder's, the latter was still damaged by respondent's illicit relationship with Crandall because the fact that it was paying Crandall 25¢ per package is an indication that it would have been willing to sell the produce to Magruder's for the invoice price less 25¢. *See United States v. Little*, 889 F.2d 1367 (5th Cir. 1989), *reh'g denied*, 894 F.2d 406 (5th Cir. 1990) (Table); *United States v. Fagan*, 821 F.2d 1002, 1010-11 (5th Cir.), *cert. denied*, 484 U.S. 1005 (1988). Also, respondent's competitors, who were not similarly engaged in making payments to Crandall, were at a distinct competitive disadvantage.

Respondent argues that section 2(4) was not violated because Tipco made no false statements, since Magruder's Mr. Steppa knew of the payment to employee Crandall (Respondent's Reply at 10 (July 5, 1990)). I reject this argument as not being supported by the record.

Mr. Steppa testified that he was unaware of the payments (Tr. 258). Respondent makes several arguments attacking Steppa's purported ignorance of the payments, e.g., that for years prior, various Magruder's employees joked about Crandall receiving payments from suppliers;

that Crandall should have been subpoenaed by complainant but was not; that the Tipco storage space rented to Crandall indicated payments; that Steppa had repeatedly asked Tipco's Spinale if Tipco was giving anything to Crandall; and that Steppa was "acting" when he seemed shocked when told by USDA inspectors of Tipco's payments.

I do not find respondent's arguments persuasive. For instance, the Magruder's employees' jokes about Crandall's payments preceded by several years the actual June 1988 beginning of the payments. Crandall *was* subpoenaed in the *Goodman* case, but did not appear. The arrangement of Tipco storage space apparently was for the innocent purpose of holding produce for Magruder's until weekend sale. No evidence is on the record to refute this. When Steppa asked Spinale directly in August or September 1988 if Spinale was giving Crandall anything, Spinale said no. (The ALJ found (Initial Decision at 29) that Steppa became aware of the payments in August or September. As such, the ALJ should have found, at the very least, that violations occurred in June and July 1988, but he did not!) When Steppa appeared shocked by the occurrence and the amounts of the payments, he was convincing to the USDA investigators (Tr. 108). In sum, these allegations and arguments are not convincing that Steppa was aware of the surreptitious payments. I note that the ALJ in *Goodman* decided this same issue in favor of Steppa's credibility that he was unaware, and I affirmed.

In closing this part, I note that I am also aware that the Magruder's chain increased from 3 to 17 stores during Crandall's employment (Tr. 260). It is therefore, understandable that Crandall had a large degree of delegated authority during this expansion period. Also, I fail to glean from the record any apparent reason why Steppa should want his employees to receive payments from suppliers. In fact, Magruder's written policy was to the contrary. Complainant's Exhibit 8 contains the "Ma-

gruder, Inc. Employee Handbook (Employee Code of Conduct # 15)" which states that "[a]ccepting gifts, gratuities, discounts or other favors from company's vendors or excessive fraternization with them is expressly prohibited." Crandall had even been challenged by Steppa for personal conversion of a television set given by the South Carolina Peach Board to promote peaches (Tr. 245, 294, 501).

Respondent argues that the allegations of the complainant, based upon implied duties under § 2(4), violate due process (Respondent's Reply at 20-28 (July 5, 1990). I disagree.

The argument is that the PACA, and the Department's regulations thereunder, do not provide sufficient notice to respondent that commercial bribery would violate the PACA. Moreover, respondent argues that fundamental fairness would require that there be some prior PACA decision on the record to show the Secretary's position. Also, that Packers and Stockyards cases finding commercial bribery to be a violation of the P&S Act should not apply to PACA; and in any event, do not constitute proper warning to PACA licensees.

I reject respondent's view for the many reasons already stated above. The scheme entered into by the licensee involved hundreds of thousands of dollars worth of produce, and tens of thousands of dollars in sub-rosa payments. The Act's remedial provisions prohibiting the failure, without reasonable cause, to perform any express or implied duty (7 U.S.C. § 499b(4)) are sufficient to advise regulated licensees that they cannot engage in the massive commercial bribery involved here.

In addition, the fact that the Secretary until now (*Goodman*, of course, arose out of the same situation) has not had sufficient evidence to prosecute a PACA licensee involved in commercial bribery is no reason to exonerate respondent. It is axiomatic in administrative law that the

agency has prosecutorial discretion to pursue those violators where it can make its case. Even if complainant had previously failed to proceed against others for similar violations (which is not the case), violators are not excused because violations in similar circumstances were not prosecuted, or the violator was not sanctioned in the same fashion as other violators. (See *In re Ozark County Cattle Co.*, 49 Agric. Dec. ——, slip op. at 43-44 (Mar. 19, 1990); and *In re Kaplinsky*, 47 Agric. Dec. 613, 638 (1988)).

The fundamental unfairness in this case concerns not only Magruder's, but also other PACA licensees who were deprived of possible business opportuities by Tipco's violations. Tipco was charged under § 2(4) for illicit payments of tens of thousands of dollars to secure hundreds of thousands of dollars in business. This is not a case of a promotional TV set.

Respondent argues that this was not commercial bribery; rather, Tipco was the victim of extortion. I disagree.

The ALJ did not decide whether extortion is a defense to the charges brought against the respondent, because (he states) it was unnecessary due to his ruling on the issue (Initial Decision at 22). Respondent's primary defense to the complaint is that its payments to Crandall ought to be excused because they were "extorted" from it. Even if that were true (which is not adequately shown here), it would be irrelevant and immaterial. The fact still remains that respondent did not have to agree to make the payments—it could have contacted Magruder's—it could have contacted a county, state, or Federal law enforcement official (including PACA officials). But, respondent voluntarily chose to pay Crandall, not once, not twice, but weekly over a lenghty period of time—a period long enough to conclude that, except for its behavior having come to the attention of the Department, it would have continued making those payments today.

Moreover, respondent's arguments fails on the point of whether it was "compelled" to make these payments. It is argued that it had to bribe Crandall because, at the time Crandall allegedly demanded the payments, Magruder's owed it about $275,000, which respondent feared Magruder's wouldn't pay (Tr. 482). This argument lacks merit. Magruder's had a legal obligation under the PACA and unded general commercial law to pay respondent for the produce it received and accepted. Therefore, neither Crandall nor Magruder's could have refused to pay. It follows that respondent was under *no* compulsion to make the payments to Crandall. Indeed, the record clearly establishes that respondent made the payments to Crandall voluntarily in order to induce Crandall to continue purchasing produce from it because it was greatly benefiting from those increased sales. Respondent's business greatly improved over the period of time in which respondent did business with Crandall. Complainant's Exhibit 9, Table II, reflects that, from October 1987, before the scheme began, to December 1988, when it ended, respondent's total monthly business increased from $389,656.95 to $802,763.69—an increase of 106%. This sales increase is directly related to the respondent's increased sales to Magruder's through Crandall. Clearly, respondent greatly benefitted from Spinale's arrangements with Crandall.

Moreover, because of its special arrangements with Crandall, respondent was able to use space and equipment which it owned or was leasing which otherwise would have gone fallow (Tr. 610-13). With regard to this space, in its initial submission, respondent claims that it did not pursue other uses for this space. However, there is nothing in the record to indicate that it had alternatives for this space other than to use it to store the "fruit" it was purchasing to sell to Magruder's. Indeed, Spinale testified that that space had not been used since August 1987 (Tr. 611).

In connection with its argument that, based on the facts in this case, Crandall must be said to have "extorted" the $38,092.50 from it, respondent made a legal argument that Magruder's is liable for Crandall's alleged unlawful activities. This argument has no merit. The cases cited, and the principles of law argued, do not support its contention except superficially. Rather, the facts herein compel a legal conclusion that Magruder's was victimized by the illicit activities engaged in by respondent and Crandall. Agency law, interpreted in decided cases, supports a conclusion that Magruder's cannot be construed to be responsible for the acts of Crandall. In *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 138 (5th Cir. 1987), it was decided that an employer is not liable for an employee's criminal acts, committed outside his or her scope of employment, if those actions injure the employer. Also *see Restatement (Second) of Agency* § 235. As respondent issued the checks directly to Crandall, even mailing them to his home, respondent must be charged with the knowledge that Crandall was operating in his own interests and not as an agent of Magruder's. This also relieves Magruder's from responsibility for Crandall's actions. *Restatement (Second) of Agency* § 262.

Moreover, even though the respondent cited it as supporting the proposition that Crandall's alleged "extortion" of the payments from Tipco may be attributed to Magruder's, the reporter's notes (which are found in the *Restatement's* Appendix) relating to *Restatement (Second) of Agency* § 261. "Agent Position Enables Him to Deceive." make it clear that its application does not result in that conclusion. *See Restatement (Second) of Agency* § 261, Appendix at 421:

> It is difficult to state more definitely than is done in this section the limits of [a principal's] liability [to third persons for an agent's actions]. It would seem to be clear that if the agent is purporting to act as an agent and doing the things which such

> agents normally do, and the third person has no reason to know that the agent is acting on his own account, the principal should be liable because he has invited third persons to deal with the agent within the limits of what, to such third persons, would seem to be the agent's authority. To go beyond this, however, and to permit the third persons to recover in every case where the agent takes advantage of the standing and position of his principal to perpetrate a fraud would seem to be going too far. Thus, undoubtedly, the fact that a person is a bank cashier causes third persons to trust him; but the bank should not be liable to third persons defrauded by the cashier merely because the position he occupied more readily inspired the belief that he was trustworthy. . . . [In cases in which] the principal is not benefitted, and the transaction which actually causes the loss is not one in which the agent purports to represent the principal, liability should not follow.

In the instant case, there is no allegation and no evidence that Crandall purported to represent Magruder's in allegedly "demanding" the payments from Tipco. Rather, the evidence indicates that Crandall acted entirely on his own, e.g., the checks which Tipco used to pay Crandall were made out to Crandall, and either handed to him or mailed to his home address. (CX 2, 9 (p. 2)). Respondent knew that Crandall was acting on his own, which supports a conclusion that Magruder's was not responsible for Crandall's actions.

Furthermore, not even the cases cited by respondent support its position. For example, respondent cites *United States v. Lisinski*, 728 F.2d 887 (7th Cir.), *cert. denied*, 469 U.S. 832 (1984), as standing for the proposition that "[e]xtortion is the wrongful use of economic fear to obtain money." However, respondent failed to grant cognition to the remainder of the court's discussion on this point. The court also held, as have the other courts which

have considered this question, that the "economic fear" to which it referred must be "reasonable." *Id.* at 891. The decisions of the other courts cited by respondent also stand for this proposition, including *United States v. Burke*, 781 F.2d 1234 (7th Cir. 1985), which cites *Lisinski* in support; *United States v. Haimonitz*, 725 F.2d 1561 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984); and *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), *cert. denied*, 469 U.S. 1209 (1983). Moreover, even where the court did not specifically address the question of "reasonable fear" in the cases cited by respondent, later decisions make it clear that that concept was included within the court's reasoning. *Cf. United States v. Brecht*, 540 F.2d 45 (2d Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977), which is cited by respondent as it is explained by *United States v. Covino*, 837 F.2d 65 (2d Cir. 1988).

As applied herein, Spinale's feigned "fear" that Magruder's would not pay Tipco for the produce which Magruder's had already received and accepted is unreasonable in view of the fact that such payments were required by the PACA and other more general legal principles. Thus, the payments it made to Crandall were not "extorted" from it. Further, the *Lisinski* court also points out, *id.* at 892, that even though the payments might have been "extorted" from it, a prosecution of it for bribery would not be precluded, as follows:

> Lisinski contends that this is a case of bribery, not extortion, because of the fact that Patras was willing to pay to influence official action and because there was no compulsion on Lisinski's part. This argument is routine in extortion cases and meritless on the facts of this case. Bribery and extortion are not mutually exclusive. *United States v. Price*, 617 F.2d 455 (7th Cir. 1979). "That such conduct may also constitute 'classic bribery' is not a relevant consideration." *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct.

1561, 43 L.Ed.2d 775 (1975). Regardless of the fact that a prosecution for bribery might have been sustained, there exists more than adequate evidence to sustain Lisinski's extortion conviction.

This same reasoning is evident in *United States v. Hall*, 536 F.2d 313, 321 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976), as follows:

> The question of charging Hall with the acceptance of a bribe need not be considered. We disagree with the argument advanced that bribery and extortion are mutually exclusive. To be sure, they are distinct crimes as shown by *United States v. Addonizio*, 451 F.2d 49, 72-73 (3d Cir.), *cert. denied*, 405 U.S. 1048, 92 S.Ct., 31 L.Ed.2d 591 (1972); *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972); *United States v. Kahn*, 472 F.2d 272, 278 (2d Cir.), *cert. denied*, 411 U.S. 982, 93 S.Ct. 2270, 36 L.Ed.2d 958 (1973). It cannot be said that in a bribery case there is never an aspect of coercion on the part of the bribee. The Seventh Circui has said that such conduct (extortion) may also constitute classic bribery. The [*United States v. Braasch*], 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1562, 43 L.Ed.2d 775 (1975)] court also noted that bribery and extortion are not to be considered mutually exclusive nor does the fact that the alleged victim of the extortion were also bribers nullify anything. *See United States v. Hyde, supra.*
>
> So, therefore, charging Hall with extortion and Taylor with bribery was not logically inconsistent. Nor do we see any inconsistency giving rise to the invalidity arising from Hall extorting from Taylor to bribe Rogers because, first, there is no logical inconsistency and, second, modern courts refuse to apply these mechanical rules which in years past made for easy but often unjust decisions.

In point of fact, the defense espoused by respondent has been rejected by the courts in cases with like circumstances, *see e.g.*, *United States v. Colacurcio*, 659 F.2d 684, 690 (5th Cir. 1981), *cert. denied*, 455 U.S. 1002 (1982), as follows:

> Appellants reason that they were coerced by the police into offering bribes and that such economic coercion—sufficient to establish a case under the Hobbs Act, 18 U.S.C. § 1951—is a complete defense to the bribery charge.
>
> This argument is unconvincing for three reasons. First, the Supreme Court held in *United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980), that the duress defense is not available "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm." *Id.* at 410, 100 S.Ct. at 634 (*citing* W. LaFave & A. Scott, Handbook on Criminal Law 379 (1972)). In the present case there were legal alternatives available: the matter could have been reported to the Internal Affairs Division of the New Orleans Police Department, [footnote omitted] to the district attorney, or to the United States attorney. Since appellans failed to pursue available reasonable alternatives, they may not successfully raise the duress defense. [Footnote omitted.]
>
> Further, appellants' insistence that extortion can be a defense to bribery is incorrect. *See United States v. McPartin*, 595 F.2d 1321 (7th Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979). Therefore, even if the appellants were subjected to extortion, they can still be convicted on the bribery charge.

In the instant case, respondent, as did the appellants in *Colacurcio*, had available to it many reasonable, legal

alternatives to violating the law. Spinale, after he was approached by Crandall, could have contacted Mr. Steppa; he could have contacted the PACA Branch; he could have contacted the Federal Bureau of Investigation; he could have contacted the Maryland State Police; and/or he could have contacted the Howard County police (the Jessup, Maryland, market is in Howard County). But, Spinale instead took the opportunity to greatly increase Tipco's business. Under these circumstances, respondent has hardly proven any facts exculpating it from the PACA violations, which complainant proved by substantial evidence in the record. Ultimately, respondent has failed to show that it, and not Magruder's, was the victim.

Respondent argues that the ALJ did not err in concluding that the PACA Branch had conducted a faulty and unfair investigation (Respondent's Reply at 34-41 (July 5, 1990)). I disagree.

The record is clear that the PACA Branch, in conducting a complaint-based investigation of Sid Goodman & Co., discovered evidence that Goodman was paying Crandall 25¢ per package for produce he purchased from it on behalf of Magruder's. When, as part of this *complaint-based* investigation, PACA Branch officials interviewed Mr. Steppa, he raised questions regarding Tipco. Mr. Steppa indicated that Crandall had been buying more than it had in the past and that, when Spinale called Crandall, their conversations were furtive. This provided the PACA Branch with sufficient cause to investigate respondent's records. This review indicated that it, too, was paying Crandall 25¢ per package for the produce he was buying from Tipco on Magruder's behalf, and that Crandall, during 1988, had increased Magruder's purchases from respondent.

Moreover, respondent's employees, when interviewed by the Department's investigators admitted that, after June 1988, Tipco was making these payments, as well.

Based on this evidence, the complainant had no choice but to proceed against respondent.

The ALJ implies that the investigation was faulty because the Department's investigators made no attempt to interview Crandall. He finds not satisfactory the investigators' testimony that Crandall was not interviewed because he was never on the market when they were there; that the investigation, including the admissions made by Spinale and by the respondent's other employees, contained sufficient proof that the respondent was making the payments to Crandall; that theer was really no need to quesiton him; and that, based on their experience in attempting to discuss this matter with the buyer for another supermarket chain who had been receiving payments from Sid Goodman & Co., Crandall would probably not speak with them. I find that the investigators had just cause for these views. (I note also that in *Goodman*, the record contained a lengthy deposition given by Crandall in a private court case, and I adopted the ALJ's view that "a thorough examination of the deposition results in the conclusion that in fact Mr. Crandall did not inform Mr. Steppa of the per package payment he had received from respondent [Goodman]" (Appendix, slip op. at 25)).

Miscellaneous Motions by Complainant.

Complainant's appeal contains a number of specific complaints concerning the ALJ's handling of this proceeding; for instance, that the ALJ should have denied respondent's motion for a more definite statement in the original complaint; that the ALJ made numerous erroneous rulings at the hearing; that the ALJ erroneously admitted all of respondent's exhibits; that the ALJ allowed respondent's counsel the latitude to harass government witnesses; that the ALJ erroneously applied the marital privilege to insulate respondent's witness from cross-examination, even though both spouses were cor-

porate officers of respondent; and that the ALJ made numerous erroneous conclusions, findings of fact, and credibility determinations (Complainant's Appeal at 2-39 (May 10, 1990)).

Since I am vacating the ALJ's decision, no ruling is necessary on most of these. Moreover, the remaining complaints, except for the motion to strike "all of respondent's exhibits and testimony regarding them" (*id.* at 13), do not really lend themselves to effective remedial action by the Judicial Officer. Performing the surgery requested would not improve this record, in any event.[23] Thus, complainant's motion to strike respondent's exhibits, and all the attendant testimony thereto, is denied.

Further, any and all other motions and arguments by either party, even if not specifically addressed, have been considered, and are hereby denied, to the extent that they are inconsistent with the final decision herein.

Sanction.

Respondent's violations are extraordinarily serious. Complainant seeks revocation of respondent's license as the proper sanction in this matter, and I agree. Support for the issuance of this sanction is found in the testimony of Mr. James R. Frazier (Tr. 328-32). The decisive factors which entered into complainant's consideration for this recommendation were there discussed, and include: number of violations; period of time during which violations took place; seriousness of violations; impact of the violations on the industry as a whole; the interests of the Secretary in ensuring that the crucial basic trust relationship which exists among members of this multi-billion dollar industry is maintained; the management decision made by respondent; and the need of the Department, the industry regulator, to eliminate this kind of conduct. Taking all these factors into consideration, the sanction

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[23] Some multi-page exhibits do not have separately numbered pages. Each page of a multi-page exhibit should be separately numbered.

sought by complainant will be granted. *In re J.H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705 (1978); *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974).

I have carefully considered all of respondent's arguments against revocation (Respondent's Reply at 42-51 (July 5, 1990)) and find them without merit. In this decision, I am guided by the *Goodman* decision, attached as an Appendix.

In closing, I note that an affirmance of the ALJ's initial decision would have the deleterious effect of communicating to the produce industry that it is acceptable under PACA for a licensee to pay the employee of a consumer to make purchases from it on behalf of his/her employer. This is not the message the Secretary would have the produce industry receive from the Department. Based upon the preponderance of the evidence in the record, and upon inferences drawn therefrom, I find that respondent violated the PACA as alleged in the complaint.

For the foregoing reasons, the following order should be issued.

Order

The license of Tipco, Inc., is revoked.

This order shall take effect on the 30th day after service of this Decision and Order on respondent.

Done at Washington, D.C.

February 6, 1991

/s/ Donald A. Campbell
DONALD A. CAMPBELL
Judicial Officer

APPENDIX

In re Sid Goodman & Co., 49 Agric. Dec. ——— (Sept. 26, 1990), *appeal docketed*, No. 90-2209 (4th Cir. Oct. 25, 1990).

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULURE

PACA Docket No. D-89-528

IN RE: TIPCO, INC.,
Respondent

Decision and Order

[Filed Apr. 9, 1990]

This is a disciplinary proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*) (the "PACA"), the Regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1 through 46.45), ("Regulations"), and the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary of Agriculture (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice").

The proceeding was instituted by a complaint filed on April 28, 1989, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture, and an amended complaint filed on September 8, 1989. The complaints allege that respondent, Tipco, Inc., violated section 2(4) of the PACA (7 U.S.C. § 499b(4)) by making payments to William Crandall, an employee of Magruder's, Inc., a customer of Tipco's, without notifying Magruder's, to induce Crandall to purchase produce from Tipco. Respondent Tipco filed answer to the complain and amended complaint denying that is violated the PACA.

A hearing was held on October 19-20 and November 22, 1989, in Baltimore, Maryland. Complainant was represented by Edward M. Silverstein, Esq. Respondent was represented by M. Albert Figinski, Esq., and Stuart B. Berger, Esq. Briefs were filed by counsel for both parties.

I. *Background*

Respondent, Tipco, Inc., a PACA licensee, is a wholesale supplier of produce located in the Maryland Wholesale Produce Market in Jessup, Maryland. One of its customers is Magruder's, Inc., a retail food store chain with stores located in Washington, D.C., and in nearby Maryland and Virginia. Tipco sold produce to Magruder's from 1981 until December 1988.

Tipco is managed by Frank Spinale, a part owner of Tipco. Magruder's is managed by its executive vice presidnet, Stanford Steppa, who is part owner of Magruder's. From the early 1980's until late 1988, the buyer for Magruder's produce was William Campbell, who reported directly to Steppa but who, according to Steppa, "ran the produce department from A to Z. That means he bought everything and he was in charge of selling everything. He was in charge of percentages. He was in charge of advertising. He was in charge of everything around the clock, and twelve months a year—on vacation and off vacation. . . . He was the best in the market. . . . He was a super produce man. He knew more about produce than I did and I was born to the produce business." (Tr. 244, 271, 301.) Steppa and Crandall, who had adjoining offices, talked together about produce five to ten times a day. (Tr. 268, 297.)

Steppa testified that during Crandall's tenure as Magruder's buyer, Magruder's expanded from three to fifteen states and the produce department yielded a profit of seventeen to nineteen percent, but that "[i]t was a heck of a week when we cut nineteen percent." However,

Steppa admitted that in October 1988, shortly before Crandall's termination, the product department under Crandall achieved a twenty-seven percent profit. He said that since Crandall's departure the profit has been about twenty-four percent. (Tr. 260, 285, 290.)

Until 1988, Magruder's, through Crandall, bought only tomatoes, potatoes and onions from Tipco, which was one of several produce dealers with whom Magruder's did business. Spinale testified that Tipco sold this produce to Magruder's and its other customers "for whatever markup we could get" and that the quality, and price, of the same type of produce, such as lettuce, varied according to the part of the country it came from. It was the practice of suppliers such as Tipco, to sell produce, as Steppa was aware, to different grocers at different prices. (Tr. 270, 449, 475, 597.)

During a visit to Tipco's operation in January 1988, Crandall noticed that Tipco had three empty produce storage bays that a company renting them had recently vacated. Magruder had no warehouse space to store its produce and because of this lack of storage space Crandall was unable to take advantage of sales of quality produce from suppliers at the beginning of the week that Magruder's could hold until the following weekend to sell at its stores. Crandall told Spinale that he would talk to Steppa about renting the bays. A few days later he told Spinale that everything was clear for the arrangement. (Tr. 471.)

Crandall then asked Spinale to get a price on Sunkist lemons and oranges, which were produce that he had not previously bought from Tipco. Crandall told Spinale that "he wanted the best and Sunkist has one of the best reputations." Spinale got a price, which Crandall accepted and Tipco got the order. (Tr. 474-476.)

Crandall insisted that all produce he bought be the best quality, which reflected Steppa's business policy that Ma-

gruder's be known for its quality produce. (Tr. 271, 449, 457.)

Crandall followed up soon after his order for oranges and lemons with orders for apples and other fruits that he had not bought from Tipco before. According to Spinale, Crandall told him that "everything was going good, that the quality was good, and that everybody was happy. Then he started giving me a bigger list." However, although Tipco's business volume with Magruder's grew substantially in 1988, Tipco still had to compete with other suppliers. Spinale told Crandall that he could not afford to sell the fruit to Magruder's for less than $1.50 a package above its costs for the produce. He said that it cost fifty cents to transport the fruit to Magruder's stores. The remaining $1.00 would be Tipco's gross profit per package. Crandall responded that this pricing arrangement semeed fair. Thereafter, Crandall, in Spinale's words, "kept giving me a bigger and bigger list of more stuff to buy." (Tr. 472-481, 515.)

Meanwhile, Magruder's was slow (a month or longer) in paying Tipco for the produce it bought. By June 1988, Magruder's owed Tipco $276,000 (which debt was to grow to over $340,000 by the end of that year). (Tr. 482, 489.)

Then, in June, Crandall came to Spinale and, according to Spinale, demanded that Tipco start paying him twenty-five cents for each package of produce he bought from Tipco. Crandall called it "brokerage." Spinale said he was "stunned" by Crandall's announcement and took the demand to mean that he had to pay the twenty-five cents "or else" have no business. He decided to pay Crandall the money because of the $276,000 that Magruder's owed Tipco at the time and because he wanted the business. (Tr. 481-483.)

Spinale told Crandall to give Tipco a brokerage bill and that he would be paid by check. Spinale then met

with Tipco's office manager, Helen Fridy, and its bookkeeper, Sheila Lawrence, about the matter. Lawrence, who had worked for a produce dealer called Sid Goodman, which was also one of Magruder's suppliers, told Spinale that Crandall was also paid a "brokerage" fee by Goodman. Spinale said that when he learned this he figured that it was a common practice and that Crandall's status with Magruder's must have changed to broker "or something." But he admitted that he knew that Crandall was not really a broker. He also did not tell Steppa about the payments. (Tr. 483-484.)

Thereafter, Crandall was paid his "brokerage" by check each week based on the number of packages Magruder's bought. Crandall, however, never submitted any formal brokerage bills to Tipco. The payments were nevertheless recorded by Tipco as brokerage on its books and Crandall was given an IRS form 1099 by Tipco at the end of the year. His "brokerage" payments came to over $38,000. (Tr. 109-110.)

Spinale testified that Tipco absorbed the twenty-five cents that it paid Crandall in its $1.50 gross profits. Tipco's bookkeeper, Lawrence, also testified that the twenty-five cents came out of Tipco's profits. (Tr. 138-139.) Evidence was presented at the hearing, based on complainant's exhibits 6 and 10, suggesting that on two or three occasions Tipco passed on the twenty-five cents to Magruder's by marking up its produce more than $1.50. (Tr. 181, 531-533, 549-551.) There was also evidence presented showing the opposite, however, that Tipco at times got less than a $1.50 mark-up on produce it sold to Magruder's. (Tr. 585-586.) Spinale also testified that the $1.50 charge to Magruder's over Tipco's costs applied only to fruit and other produce (tomatoes, potatoes and onions) that Tipco had sold to Magruder's prior to 1988. (Tr. 535.)

In addition to Tipco's bookkeeper, Shiela Lawrence, knowing about the payments Crandall was receiving, Ma-

gruder's produce store managers were also apparently aware that Crandall was receiving payments from suppliers. Douglas Brinsfield, who is now Magruder's produce buyer, was a produce manager for one of Magruder's stores when Crandall was the buyer. Brinsfield testified that in the past four years produce managers in various Magruder's stores would talk in jest about Crandall receiving payments from suppliers. (Tr. 449-450). He also said that he did not know that Steppa ever heard such comments, but that he could have. John Martin, a produce manager for one of the stores for four years, also testified that he heard produce managers joke about Crandall receiving payments from suppliers. (Tr. 462-464.)

Steppa denied knowing that Crandall was receiving payments from suppliers and said that Magruder's had a written policy prohibiting its buyers from receiving gifts or gratuities. Buyers were supposed to report such matters to Steppa, but Steppa said that Crandall never reported receiving any payments. On one occasion, Crandall had a television set delivered to his home that the Georgia Peach Board gave to Magruder's for promoting peaches. Crandall and Steppa had a meeting about the matter, initiated by Crandall (Tr. 248-256). Steppa did not say whether he allowed Crandall to keep the set or whether he made him turn it over to the company as required by company policy.

Steppa testified that, although Crandall was a "super" produce man, he never trusted him because he had a "shady" past. He did not elaborate on what he meant by a shady past. He also said that he did not trust Spinale "from the word go" because "he was shady, too." He said he considered Spinale a "weak sister" and a "potato and tomato man." (Tr. 265, 272, 278.)

Steppa testified that he never fully understood Crandall's arrangement with Tipco to rent Tipco's storage bays, although Crandall talked to him about the matter

before renting them and he personally visited the warehouse in 1988. In the seven or eight years that Magruder's did business with Tipco, Steppa met Spinale only about five times. He talked to him a few times in 1988 when Spinale called to try to collect the money Magruder's owed Tipco. Steppa, however, said that paying bills was Crandall's department and that he had "nothing to do with whatever [Spinale] called about," but said that later in the year after Crandall's payments came out into the open, he was "absolutely" involved in the decision not to pay Tipco any more of the money Magruder's owed Tipco. (Tr. 253-255, 303.)

Although he said he did not know that Crandall was receiving payments from Tipco, Steppa testified that he had suspected something was going on between Crandall and Spinale. He said he heard Crandall having whispered phone conversations with Spinale, and that "[t]here were so many things . . . going on with that man [Crandall] with the suppliers, I had all kinds of questions. In fact, I talked about it with my relatives. I just—I didn't trust the man." (Tr. 297.) He was suspicious, he testified, because Magruder's was losing money and he didn't like the quality of the produce. (Tr. 251, 298, 302.) However, John Martin, a produce manager for one of Magruder's stores during this time, testified that the quality of the produce over the past four years had been the same. (Tr. 466.) Magruder's, as noted before, was also making a profit on its produce and Steppa equivocated when asked directly if he had problems with the quality of the produce he received from Tipco:

> Q. [Mr. Figinski] Okay. Now, you said you didn't like quality. Is that right? You didn't like the quality. That's what you answered the Judge in his questions.
>
> A. [Mr. Steppa] I don't have any problem with that.

Q. Okay.

A. Sure. I said that.

Q. But, it wasn't Tipco's produce that you didn't like the quality about.

(Pause)

Q. It wasn't the Tipco stuff that you had any problem with quaiity of—

A. I didn't say it was his. I didn't say it wasn't his.

Q. But, it wasn't his. Was it?

A. I'm not—hey, we certainly were buying a lot of grapes from Mr. Spinale. (Tr. 302.)

He also said that "as I went from store to store the produce managers in a jokingly fashion would call—and, the strangest thing—I would back Mr. Crandal [sic] up. I did. I stood behind him 100 percent. He completely hoodwinked me." (Tr. 299.)

Steppa said he would sporadically check produce prices from different suppliers on the FAX machine and questioned Crandall about the prices he was paying when other suppliers had lower prices. Crandall's replies, according to Steppa, were that the produce from other companies was not good or there was not enough or the truck would arrive late. Steppa said he was involved in so many other things that he didn't do anything about these problems he was allegedly having with Crandall. (Tr. 250-252, 280.)

When asked why he didn't tell Crandall to buy lettuce for $6.00 when, Steppa said, Crandall was buying it for $8.00, he said that he did, but that Crandall did not buy it at the lower price. When asked why he did not fire Crandall, he said he "let it go on because I did ten other things, or had other jobs to do." (Tr. 279.)

He did say that when he inspected Tipco's bays in 1988, he asked Spinale if he was "giving anything" to Crandall or whether Crandall had asked Spinale "for anything."

Steppa said Spinale replied by putting his arm around him, calling him his "buddy", and denying that he gave Crandall anything. (Tr. 257.)

He later told government investigators that he was suspicious of Crandall and Spinale because of increased purchases from Tipco in the three month period prior to November 1980. (Tr. 360.) Tipco's fruit sales, however, had peaked about April of that year and then levelled off. (Tr. 368-369, 373.)

According to Spinale, Steppa treated him like a "second class citizen," or worse, and, like Steppa, said that they had only occasional contact with each other and that several of the contacts were by phone in 1988 when he called Steppa to try to collect the money Magruder's owed Tipco. He said he saw Steppa in August or September when Steppa inspected Tipco's warehouse operation with Crandall. Steppa asked him how the warehousing operation was doing and Spinale replied that if Steppa had any problem he could look at his books. Steppa declined and said he knew "all of these tricks." (Tr. 488.) Steppa said he didn't remember whether Spinale offered to show him his books. (Tr. 269-270.) Spinale was not asked whether Steppa had asked him about making payments to Crandall.

Steppa tetified that the first time he learned that Tipco was paying Crandall twenty-five cents a package was when the "bomb hit" in November 1988. (Tr. 249.) This came about as a result of an investigation by USDA's PACA Branch of the payments to Crandall by the Sid Goodman Company. Investigator James Bright, a marketing specialist, and James Frazier, assistant branch chief, met with Steppa on November 30 to talk to him about the investigation.

According to Bright, Steppa appeared "shocked" when told about Goodman and "just blurted out, 'well, if this is going on with Sid Goodman, then it must be going on at

Tipco, also." (Tr. 63.) Steppa said he made this statement because of the large purchases being made from Tipco which he said "was very strange. A lot of things had took place. But, it just had to be." When asked what he meant by other "things", he replied "pricing of merchandise" and the "responses" he got from Crandall. (Tr. 252.)

Bright identified Steppa as the only Magruder's official he spoke to on November 30. (Tr. 30.) In his report, Bright said that "[p]rincipals of Magruder's stated their belief that a possible unauthorized payment referred to as 'brokerage' was being paid to their produce manager. Mr. William Crandall, by Tipco. Inc." (CX 9.)

The day after the investigators appeared, members of Magruder's including Steppa, and the company attorney, confronted Crandall. According to Steppa, Crandall first denied taking money, and then admitted it, saying he deserved it:

> Q. [Mr. Silverstein.] He deserved the payment?
>
> A. [Mr. Steppa.] He deserved the money, and it was his.
>
> Q. Did he say why he deserved it?
>
> A. At that point, Mr. Silverstein, it was such a turmoil in that office after that little speech he made, that I really can't tell you what happened after that. It was absolutely chaos. (Tr. 259.)

Crandall then apparently walked off the job. (Tr. 258-259.)

The investigation of Tipco by Frazier and Bright included talking to Steppa and Spinale, but no attempt was made to contact Crandall. The reasons given for not contacting Crandall are as follows:

> Q. [Mr. Berger.] My question, Mr. Bright, is, were you ever instructed by your superiors to meet with Mr. Crandal [sic]?
>
> A. [Mr. Bright.] Not to set up a meeting. No.

Q And, you never took it on your own initiative to talk to Mr. Crandal, did you?

A. I would have. I knew that he came to the market, and so I can tell you I wouldn't have avoided talking with him, and thought that maybe during the course of both investigations—I never saw the buyer for either major grocery. I never saw any buyers, to tell you the honest trust. But, if I had, of course I would have asked him about it. It was just something that you—it would have been a part of the investigation.

Q. But, only if the buyer had been there. Is that right?

A. Well, if our paths crossed during the course of the investigation. [Tr. 90]

* * * *

Q. [Mr. Figinski.] Now at one point during that soliloquy, sir, you said to me that it was important, at least my recollection of it is and my notes of it are, that it was an important piece of evidence that Mr. Steppa said that he was not aware of the payments.

To test my notes and that record, do you remember saying it?

A. [Mr. Frazier.] Yes, I remember saying it.

Q. It was important to you in bringing this prosecution that Mr. Steppa told you that he was not aware, is that correct?

A. Yes, without the knowledge.

Q. What if anythiny, sir, did you do to check Mr. Steppa's statement out, for example did you or did anyone in the agency speak with Mr. Crandal [sic]?

A. Mr. Crandel was not available the day that we were at Magruder's.

Q. Mr. Crandel had an address on his W-2 form, did he not, sir?

A. Yes, he did.

Q. Mr. Crandel had employment records that you looked at at Magruder's, did he not sir?

A. That is correct.

Q. And it had a home address on it, did it not?
A. That is correct.
Q. And it had a phone number on it, did it not?
A. I do not recall.
Q. It certainly had a home address, did it not?
A. There was an address.
Q. It was in Virginia, was it not?
A. Bumpus, Virginia.
Q. About two hours from Washington, was it not?
A. That is correct.
Q. Did you ever dispatch anyone there to talk to him?
A. No, I did not, and there are reasons for that.
Q. I am sure you are dying to tell me what they are, and I would love to know what they are, so go ahead and tell them to me.
A. Well, first of all, we felt that we had sufficient evidence at that time.
Q. You did not think that it was necessary to check out, did you that it was necessary—
A. May I finish?
JUDGE HUNT: Let him answer the question Mr. Figinski.
THE WITNESS: Okay, that was one of them. In addition to that, we had also attempted to contact Henry Hernandez who was the buyer involved in the Goodman case with Fresh Value, another retail chain. And his attorney had advised, we could never get together. His attorney really never wanted to bring him in. And we were involved in certain areas that involved possible criminal indications involving these particular buyers. And we just did not think it would be successful to pursue that area.

BY MR. FIGINSKI:

Q. Henry Hernandez has nothing to do with Tipco, does he?
A. No, he does not. [Tr. 339-341.]

* * * *

Q. You were not sure that Mr. Crandel would talk to you, but you did not make a call to him or direct anyone else to make a call to him, did you?

A. That is correct. [Tr. 348.]

* * * *

JUDGE HUNT: Mr. Frazier, on this 25 cents a package or parcel arrangement, do you consider it to be a violation if Mr. Steppa had found out about the arrangement between Tipco and Crandel [sic]?

THE WITNESS [Mr. Frazier]: And continued to allow it to happen?

JUDGE HUNT: Yes, let it continue.

THE WITNESS: Well, it would not have been a false and misleading statement if he had known about it. So that would not have been a violation.

JUDGE HUNT: Again this is your opinion.

THE WITNESS: There would not have been a false and misleading statement if he had known about it. I do not think that that is a practice that the Department would want to encourage or to condone, but I think that it would have been more difficult in framing an action. [Tr. 408-409]

* * * *

JUDGE HUNT: Do you know if any of your investigators ever contacted Crandel and asked him his opinion as to what was this arrangement?

THE WITNESS: None of them did. [Tr. 411]

* * * *

Crandall did not testify at the hearing. Tipco's counsel attempted to subpoena him, but by the time of the hearing his employment with Magruder's was terminated. He was "on the lam" and could not be found to be served. (Tr. 418.)

II. *Issues*

The issues presented by the complaint are:

1. Whether respondent Tipco made false statements to Magruder's concerning whether it was absorbing the twenty-five cents a package it was paying Crandall in its profits or passing it on to Magruder's.

2. Whether a PACA licensee has an obligation under the PACA to deal fairly with others and at arm's length; whether this obligation includes the positive duty to refrain from corrupting an employee of a customer by refraining from offering payments to the customer's employee to encourage him to purchase produce from it on behalf of his employer; and whether, if the employee seeks such a payment from a PACA licensee, it is affirmatively obligated to report that request to its customer and can only make those payments with the customer's permission. (Complainant's brief, pp. 12-13.) In short, does Section 2(4) of the PACA prohibit commercial bribery and does it require a licensee to report on a customer's employee to the customer?

III. *Law and Regulations*

Section 2(4) of the PACA (7 U.S.C. § 499b) provides that:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * *
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commisison merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such leader, or the purchase or sale of

> which in such commerce is negotiated by such broker; or to fail to refuse truly and correctly to account and make full payment promptly in respect of any transaction any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or fail to maintain the trust as required under Section 5(c);

7 C.F.R. § 46.26 of the Secretary's Regulations provides:

> It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the [PACA].

IV. *Discussion*

a. *Whether the implied duty provision in Section 2(4) of the PACA prohibits commercial bribery.*

Complainant's first contention is that Tipco, a produce dealer licensed under the PACA, made false statements to Magruder's, its customer, in violation of the PACA by implying that it was absorbing the twenty-five cents per package that it was paying Crandall, whereas it was actually passing the twenty-five cents per package on to Magruder's by charging it more than it charged its other customers; or, in the alternative, even if Tipco was not passing the twenty-five cents on to Magruder's, Magruder's was nevertheless victimized because it shows that

Tipco could have sold the produce to Magruder's for twenty-five cents less than it did.

Complainant, which has the burden of proving its allegations by a preponderance of the evidence, has not shown by such preponderance that respondent was passing the twenty-five cents on to Magruder's. As for its alternative contention, that respondent could have charged Magruder's less if it had not been paying off Crandall, it does not matter in the circumstance here whether respondent could have charged Magruder's less. What does matter is that, even if it could have charged less than it did, there is no evidence showing that the pricing arrangement for the new produce that Magruder's began buying from respondent in 1988 was not a fair arm's length transaction at the time it was entered into. There is nothing to show that Spinale knew at the time the arrangement was made that Tipco would later be forced to pay over to Crandall twenty-five cents of the profits that Magruder's agreed that Tipco was fairly entitled to.

Crandall, as Magruder's agent in making this arrangement, had full authority from Steppa to do so and there is no evidence at the time the pricing agreement was made that Crandall was not acting in Magruder's interests or that Magruder's did not receive the quality of produce for which it bargained.

Thus, Magruder's was not entitled to the twenty-five cents Tipco was paying Crandall and was not victimized by not receiving it.

b. *Whether the implied provision in Section 2(4) of the PACA prohibits commercial bribery.*

Complainant contends that Tipco's kick-back to Crandall was a failure by Tipco to perform one of the "express or implied" duties connected with any transaction covered by Section 2(4) of the PACA. Complainant contends that this implied duty provision means that licensed produce

dealers such as Tipco have a duty to "deal fairly" and at "arm's length" with their customers and that this duty includes the obligation to refrain from corrupting employees of their customers through bribes and the duty to report to a customer any request for money from the customer's employees.

Complainant, while conceding that this is a novel issue that is being adjudicated for the first time in this and the Sid Goodman case, points out that the conduct Tipco engaged in is commercial bribery which is unlawful under laws prohibiting unfair and deceptive commercial practices, viz. The Travel Act, 18 U.S.C. § 1952, The Clayton Act as amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 and a law administered by the Secretary of Agriculture, The Packers and Stockyards Act, 7 U.S.C. § 181.

Complainant further points out that even though Congress did not consider whether employee corruption through bribery was a violation of the PACA when it enacted amendments to the law in 1942, this does not preclude the Secretary from now having the authority to interpret the PACA to prohibit commercial bribery in transactions in the produce industry, citing *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947).

In that case, the Court, while holding that agencies have the full authority to fill "interstices" in a law through rulemaking or adjudicatory proceedings, also noted that agencies are accorded this flexibility because it allows them to deal with unforseen problems and because an agency may initially have had insufficient experience in dealing with a particular problem.[1] Neither circumstance

[1] The Supreme Court, however, has also held that it will not uphold a vague law whose "prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In this regard, it is noted that a licensee's implied duty to "deal fairly" with others is a very imprecise term that offers no guidelines or standards, and the

is present here, however. The Secretary, with long experience administering the Packers and Stockyards Act, is not inexperienced and no evidence was presented that commercial bribery was an unforseen problem that now has surfaced as a problem of such dimensions in the produce industry that it must be dealt with through the PACA rather than through one of the laws Congress specifically designated to deal with such practices.

Moreover, the Secretary has issued no interpretive PACA regulations on bribery and a PACA advisory committee, whose purpose is to recommend changes in the PACA to the Secretary and to Congress, has apparently not proposed any changes relating to bribery. (Tr. 405.)

Congress was also aware of the existence of commercial bribery in 1942 when it amended the PACA. It had enacted laws dealing with unfair and deceptive commercial practices earlier in 1921 (Packers and Stockyards Act) and in 1936 (Robinson-Patman amendments).

Indeed, it could be inferred that Congress, to avoid having a proliferation of laws and agencies dealing with unfair and deceptive commercial practices, intended that only specific laws and agencies deal with the matter. The power of the Fair Trade Commission, for instance, under its act (15 U.S.C. § 45), has broad jurisdiction over "persons" with one of the few express exemptions to its jurisdiction being the Secretary of Agriculture's authority over unfair and deceptive practices involving transactions under the Packers and Stockyards Act. It would seem, therefore, that if Congress wanted the Secretary also to have authority over such practices in the produce industry under the PACA it would have said so as it did for the Packers and Stockyards Act.

The Federal Trade Commission, it might also be noted in passing, even though given specific authority to police

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Secretary's regulations not only do not define "deal fairly," they do not even mention the term.

unfair commercial activity, is still required in Section 57a, when developing rules defining commercial acts or practices that it consider unfair, to follow formal rulemaking procedures for public comment and is even required to submit the proposed rules to Congress. The Secretary, in this proceeding, proposes to adopt such specific rules, not through rule making, but through an *ad hoc* proceeding.

Furthermore, a literal reading of Section 2(4) of the PACA does not easily lend itself to the interpretation complainant seeks, that is, that it encompasses unfair and deceptive practices in all transactions involving PACA licensees. As complainant states in its brief: "[The PACA's] *primary purpose* was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities." (emphasis added; citations omitted.) Thus, the references to "transactions" in Section 2(4) were obviously originally intended primarily to provide protection to farmers in transactions with dealers and brokers. However, no farmer or grower is a party to the transactions in this case. Complainant nevertheless would expand the scope of Section 2(4) to cover not only grower-to-dealer transactions, but also cover all later fair dealing transactions between dealers and everyone they deal with.

The point is not whether commercial bribery should be prohibited in transactions between dealers and their customers, but whether such practices are prohibited by the PACA. It would appear that the PACA is not that broad and that Congress intended that other laws regulate such activity.

However, the Secretary's policy is liberal in giving great weight to proposed interpretations of the law by its constituent agencies.[2] See e.g., *Jackie McConnell et al.*,

[2] The Secretary, however, has indicated that its agencies should in some cases follow notice-and-comment rulemaking procedures rather than *ad hoc* proceedings before imposing new requirements

44 Agric. Dec. 712, 730 (1985); *Eldon Stamper*, 42 Agric. Dec. 20, 49 (1983); *Norwich Veal and Beef, Inc.*, 38 Agric. Dec. 214, 221 (1978). And an argument can be made that even though other laws dealing with unfair commercial activity have primary authority in this field, it is not exclusive authority and that the PACA does cover such matters, as the administrative law judge in the *Goodman* case decided (*Sid Goodman & Company, Inc.*, PACA Docket No. 89-523, February 28, 1990). Therefore, in view of the Secretary's policy and for reasons of comity, I find that Section 2(4) of the PACA does prohibit commercial bribery in transactions between licensed produce dealers and their customers.

However, I do not find that a licensee has a fair dealing duty to report to a customer an attempt by the customer's employee to obtain money from the dealer. This requirements goes too far even under a lenient statutory interpretation policy. From a practical standpoint alone, it could force a dealer to risk committing economic suicide.

If, for example, a dealer like Spinale was required to blow the whistle on the employee of a customer like Steppa, who does not trust either the dealer or his employee, the customer would either side with the employee, who would then stop buying from the dealer (and also possibly file a defamation of character suit or a PACA complaint, or both, against the dealer with the outcome, hinging on credibility, being anybody's guess), or the customer would sack its employees, which would result in the termination of the dealer's sales to the customer since, as here, the employee was the only reason the customer was buying from the dealer. In either case, the dealer ends up a loser, despite fulfilling its alleged duty to "deal fairly."

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on the public. *Wiley Prentice*, —— Agric. Dec. ——, P.Q. Docket No. 161, Oct. 27, 1988.

On the other hand, if the dealer fails to blow the whistle, he would be failing to perform a duty required by the Secretary. His conduct would be considered intentional under the Secretary's well-established rulings which also automatically considers any intentional act to be willful conduct. *Shatkin*, 34 Agric. Dec. 296 (1975); complainant's brief p. 18. The customary penalty for a willful violation is revocation or suspension of the dealer's license.

Even though these results are harsh, the Secretary probably could impose a whistleblower duty on a dealer, as a condition of holding a government license, provided, however, that the duty is validly imposed only under clear statutory authority, since "laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford, supra.* There is, in this case, no such clear statutory authority and there are certainly no explicit standards for complainant to follow in determining what constitutes the vague duty to "deal fairly." In the absence of explicit standards, the complainant's determination that respondent has the duty to be a whistleblower is an arbitrary interpretation of a vague legal standard. It is accordingly found to be invalid.

c. *Whether extortion is a defense to a charge of bribery.*

Respondent argues that, in the circumstances here, this is not a case of Tipco bribing Crandall, but rather a matter of Crandall extorting money from Tipco. Crandall, in other words, had set up Tipco for his scam. He threw a lot of business Tipco's way and then in effect told Tipco that if it wanted to continue receiving this business it had to pay Crandall for it.

Extortion is the wrongful use of economic fear to obtain money. *United States v. Burke*, 781 F.2d 1234 (7th Cir. 1985). The crime includes threats of loss of business, and

there does not have to be an actual threat if the person being extorted has a reasonable basis for his fear. However, bribery and extortion are not mutually exclusive. *United States v. Lisinski*, 728 F.2d 887 (7th Cir. 1984).

In the circumstances here, a strong case for extortion could be established (that is, rather than being corrupted, Crandall the employee was doing the corrupting). However, in view of my ultimate decision in this case, it is not necessary to determine whether Crandall's conduct is a defense to a charge of bribery.

d. *Whether Steppa knew prior to November 30 that Tipco was making payments to Crandall.*

As Frazier testified at the hearing, if Steppa knew of Tipco's payments to Crandall, there would be no violation of the PACA because there would be no express of implied false or misleading statement. Steppa denies knowing about the payments until November 1988. His denial, however, is not convincing.

As a witness, Steppa impressed me as an intelligent, outspoken, and forceful individual. The expansion of Magruder's from three to fifteen stores in ten years in the competitive Washington, D.C., area reflects Steppa's skills as an astute manager. As a witness and as a person "born to the produce business," he certainly did not appear to be a gullible businessman who would be easily "hoodwinked" by anyone in a business he knew so well, particularly by persons he did not trust. His testimony, overall, was also vague and less than candid on many key matters.

In his testimony, Steppa tried to distance himself from Crandall's operation of the produce department. He said that Crandall was "in charge of everything involving produce," and implied that he exercised little supervision over Crandall, testifying, for instance, that he did not really understand the warehouse arrangement between

Crandall and Spinale, that he had little to do with Crandall's dealings with Tipco, and that he did nothing when he found fault with the quality and pricing of the produce Crandall bought.

In regard to the warehouse arrangement between Crandall and Tipco there is nothing in the record that shows that this straightforward arrangement was mysterious or difficult to understand. It is also improbable that an experienced and cost conscious manager would approve an arrangement of this sort that he did not understand. Before renting the space, Crandall had to clear it with Steppa. Then, despite his busy schedule, Steppa took time to personally inspect the warehouse facility. From these circumstances it can be concluded that Steppa did in fact understand the warehouse arrangement. His claim to the contrary on a matter like this that in itself is of little significance would seem to serve no other purpose than an attempt by Steppa to try to conceal the extent of his actual knowledge of this and other dealings between Crandall and Tipco.

Likewise, Steppa said that when Spinale would call him to try to collect the money Magruder's owed Tipco, he passed it off as a matter that Crandall dealt with, that he was not involved with anything Spinale called about. Crandall did deliver checks to Tipco, but there is no evidence that Crandall, a person Steppa did not trust, was delegated the authority to authorize payments involving hundreds of thousands of dollars, a function that ordinarily resides in a much higher level of management. Steppa implied that he did not exercise that function in Tipco's case until December when he said he was absolutely involved in the decision not to make any more payments to Tipco for the produce Magruder's had bought.

In addition to unsuccessfully trying to distance himself from knowledge of Crandall's business transactions with Tipco, Steppa also implied that he exercised little supervision over Crandall, implying that Crandall did pretty

much what he wanted in buying produce, that he ran the produce department "from A to Z." Steppa, however, also said that he talked to Crandall up to ten times a day about produce and that he compared the prices that Crandall was paying for produce with the prices other suppliers were charging. He questioned Crandall when there were discrepancies, such as when there was a difference of six and eight dollars for lettuce. Steppa implied that Crandall's short answers were unsatisfactory, but, oddly, that he did nothing about it because he was too busy with other matters. He further testified that he had complaints about the quality of some produce and with pricing, and that Magruder's was losing money.

If what Steppa implied were true, the manager of a money-losing business, no matter how busy he was, could not tolerate an insubordinate and untrustworthy underling like Crandall whose autonomous decisions could jeopardize the company. Yet, Steppa tolerated Crandall's actions as the produce buyer. An obvious reason for tolerating him would be because, as far as results were concerned, Crandall was getting good results. Steppa stated that Crandall was a "super" produce man, but contradicted himself by suggesting that he had problems with the quality and pricing of the produce Crandall bought. It is probable that Crandall, when questioned by Steppa, said that he was paying higher prices for some produce, but doing so because it was necessary in order to obtain the quality produce Steppa insisted on, in the quantity the company needed, and from suppliers who could be depended on for delivery.

There was, however, too much at stake, if the company was losing money, for Steppa to have relied only on Crandall's word for this and do nothing if Crandall was paying too much for inferior produce. Being a manager with experience in produce himself and being responsible for Magruder's overall success, Steppa would not likely have done nothing. Rather, he said that he continued to back

Crandall "100 percent," which strongly indicates that Steppa, rather than doing nothing, did take measures to verify Crandall's claim that he was not paying more than necessary for the best available produce.

Crandall's answers would therefore not be ones that a manager concerned with costs would like, but answers he found were substantiated. As for Steppa's vague reference to produce quality, he in effect admitted that he had no more problem with the quality of the produce Crandall bought from Tipco than he had with produce from other suppliers. It could even be inferred from all the circumstances that Magruder's was getting better quality produce from Tipco than it was getting from other suppliers. There is also no substantial evidence that Magruder's was paying more for the produce it received from Tipco that it had to pay other suppliers.

Magruder's may have been losing money, overall, as Steppa claims, but it was making a good profit on its produce—seventeen and up to twenty-seven percent. Steppa tried to downplay Crandall's contribution to these profits, but the record shows that Magruder's had achieved one of its highest profits in proudce while Crandall was still the buyer.

What I infer from these circumstances is that Steppa kept a much closer eye on Crandall and knew more about Crandall's transactions and arrangements with suppliers than he claims, and required Crandall to explain and justify the prices he was paying for produce, including the produce he was buying from Tipco. I further infer that Crandall was buying quality produce, paying more for it when necessary to obtain the quality Steppa demanded, and in the process earning Magruder's a good profit on its produce.

It was not, therefore, Crandall's end results that would be objectionable. What would be objectionable would be Crandall's methods in getting those results. One such

objection was Crandall's increase in the purchase of fruit from a "potato and tomato" man like Spinale with a "shady past." Steppa said he became suspicious of Crandall and Spinale when the orders for fruit from Tipco increased in the three month period just before the investigation began in November 1988. However, the increase had peaked in April 1988, which would be the logical time for a manager monitoring Crandall's orders to become suspicious, particularly when the increase involved two people he did not trust to start with. In other words, he became suspicious much sooner than he implies.

Steppa also had other reasons to suspect that Crandall was up to something because of his knowledge of Crandall's proclivity to evade company policy prohibiting him from accepting gifts or gratuities. Crandall had earlier tried to have a television set delivered to his home that was destined for the company. Steppa also referred to other, unexplained, reasons for being suspicious saying that there "were so many things" going on between Crandall and suppliers.

It was also a common joke with the stores' produce managers that Crandall was on the take. It is not only unlikely that a manager like Steppa who knew the produce business so well would be unaware of such talk, but Steppa also admitted that when he "went from store to store to store the produce managers in a jokingly fashion would call—. . ." At this point, he made a sharp change in the direction of his testimony and never finished his statement, except to say that he backed Crandall. It is inferable that what he was going to say was that the produce managers were talking about Crandall's kick-backs. It is also inferable that Steppa backed Crandall despite his shady method of operating because he continued to obtain produce in the quality and quantity that Magruder's wanted.

Steppa also seemed to imply that he conducted some sort of investigation because of the "strange" things that

were going on and that he talked to his relatives about the matter.

Somewhere in the course of these activities, I find, Steppa discovered the payments between Tipco and Crandall. He demonstrated that he had learned of this arrangement when he later spoke to investigators and, to describe the arrangement between Tipco and Crandall to investigator Bright, used the word "brokerage," the same term coined by Crandall when he demanded payments from Spinale.

It was also about August or September that Steppa saw Spinale and made the remark, after being told he could see Tipco's books, that "he knew all the tricks," telling Spinale in so many words that he was on to Crandall's and Spinale's arrangement. Steppa said that when he questioned Spinale about making payments to Crandall, Spinale denied it while putting his arm around him and calling him his buddy.

It strains credulity to believe that Steppa would accept this denial from a man he did not trust or that he would tolerate such condescending gestures from a man he hardly knew, regarded as a "weak sister" and disparaged as a "potato and tomato" man. And even if the incident did occur as Steppa claims, the question in itself demonstrates that by that time he had knowledge of the pay-off from Tipco to Crandall.

Despite Steppa's knowledge, the arrangement continued until the "bomb hit" at the end of November. It was not, however, an arrangement that a manager of a reputable business would necessarily want to condone or be associated with. Nevertheless, it was an arrangement that a money-losing company in a highly competitive business could tolerate. The buyer was a "super" produce man and the company had operated with its buyer's shady past and reputation for being on the take for several years. Moreover, since the supplier had to pay

the "brokerage" out of its pockets, the company was not losing money on the arrangement. The company, in the meantime, continue to receive produce in the quantity and quality it wanted.

Whether or not this was Magruder's justification for allowing the arrangement between Crandall and Tipco to continue after Steppa learned of it, I nevertheless find, based on Steppa's demeanor and testimony at the hearing, that his testimony was not credible that he did not know of the payments from Tipco to Crandall. Rather, based on consideration of all the evidence and testimony, I find that Steppa did become aware of the payments sometime in August or September.

As Steppa, Magruder's executive vice president, knew of the payments and allowed them to continue, Magruder's did not have false or misleading information relating to its purchase of produce from Tipco. There was, therefore, no violation of the PACA. Accordingly, the complaint will be dismissed.

e. *Whether a fair investigation was conducted.*

This case alleging a duty of fair dealing by persons subject to the Secretary's authority ironically raises the issue whether the Secretary, through the actions of complainant, has dealt fairly with a person it investigated. The investigators in this case admitted that, before filing the complaint, they never contacted, or attempted to contact, a person with first-hand information in this case, Crandall, who was the catalyst that precipitated this action.

Although agencies certainly have wide and usually unreviewable discretion in conducting investigations, it would seem that basic concepts of fairness require that when as here a government agency conducts an investigation that is likely to lead to expensive adversary litigation (rather than rulemaking) involving a novel issue of law that hinges on factual determinations, it should

lay a better factual groundwork than it did here. If it had, there may not have been a complaint and hearing in this matter.

As the witnesses in effect admitted, this case hinged on Steppa's knowledge relating to whether or not he knew of Tipco's payments to Crandall. Yet, complainant did not contact Crandall to determine what information he could provide on this crucial issue and to fill many of the gaps in Steppa's testimony, such as Steppa's vague reference to Crandall's alleged shady past, his dealings with other suppliers, and Steppa's evasive testimony concerning the reasons Crandall gave for claiming that he was entitled to the payments he received from Tipco.[3]

The reasons complainant gives for not contacting Crandall were that Crandall happened not to be at Magruder's when the investigators were there, that they had enough information without talking to Crandall, and that Crandall probably would not have talked to them anyway.

These reasons are not satisfactory. They are also excuses and the Secretary's longstanding policy is not to accept excuses in PACA cases. *B.G. Sales Co., Inc.*, 44 Agric. Dec. 2021, 2028 (1985).

Although there are no sanctions that can be imposed when the government is remiss in its duties, the circumstances here do raise the issue whether it was substantially justified in filing the complaint. However, whether complainant's position was justified despite its failure to conduct a proper investigation can only be determined after a final decision is rendered. *Wiley Prentice, supra.*

---

[3] The Secretary's policy is frequently to draw an adverse inference when a party fails to have a witness with first-hand information testify. See e.g. *George W. Saylor, Jr.*, 44 Agric. Dec. 2238, 2488 (1985). Although complainant failed to obtain a statement from Crandall when it could have, I do not draw an adverse inference against complainant's position because it is not shown that complainant knew of Crandall's whereabouts at the time of the hearing or that it could have otherwise called him as a witness.

V. *Findings of Fact*

1. Respondent Tipco, Inc., is a corporation licensed under the PACA. Its operation is located at the Maryland Wholesale Produce Market in Jessup, Maryland.

2. Respondent's manager at all times relevant was Frank Spinale.

3. Magruder's, Inc., is a retail food store chain with stores located in and around Washington, D.C.

4. Magruder's executive vice president and manager at all times relevant was Stanford Steppa.

5. Magruder's buyer for the produce it sold in its stores at all times relevant was William Crandall.

6. Margruder's bought produce from respondent from about 1981 to about December 1988.

7. Crandall had authority to buy produce from respondent on Magruder's behalf.

8. Until 1988, Magruder's bought tomatoes, potatoes and onions from respondent.

9. From January 1988 to about December 1988, Magruder's bought fruit as well as potatoes, tomatoes and onions from respondent.

10. Respondent and Magruder's entered into an agreement in January 1988 that Magruder's would pay respondent a gross profit of $1.50 above respondent's cost for each container or package of fruit it bought from respondent.

11. In June 1988 Crandall asked for and received from respondent a payment of twenty-five cents for each package or container of fruit Magruder's bought from respondent.

12. Respondent paid Crandall the twenty-five cents out of the $1.50 gross profits it received for each package or container of fruit it sold to Magruder's.

13. In August or September 1988 Magruder's became aware of the payments from respondent to Crandall and allowed them to continue.

VI. *Conclusions of Law*

Respondent did not violate the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*).

VII. *Order*

The complaint and amended complaint in this matter are dismissed.

Pursuant to the Rules of Practice, this decision and order will become final without further proceeding 35 days after service on the parties unless appealed to the Judicial Officer by a party to the proceeding within 30 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.145.

/s/ James W. Hunt
JAMES W. HUNT
Administrative Law Judge

April 6, 1990

APPENDIX D

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

PACA Docket No. 89-528

IN RE: TIPCO, INC.,
Respondent

ORDER

[Filed Mar. 6, 1991]

The order previously issued in this case is hereby stayed pending the outcome of proceedings for judicial review.

Done at Washington, D.C.

/s/ Donald A. Campbell
DONALD A. CAMPBELL
Judicial Officer

Dated: March 6, 1991

APPENDIX E

[Filed March 13, 1992]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1435
89-528-D

TIPCO, INCORPORATED,
Petitioner

v.

CLAYTON YEUTTER, SECRETARY,
U.S. DEPARTMENT OF AGRICULTURE;
DEPARTMENT OF AGRICULTURE;
AGRICULTURAL MARKETING SERVICE,
Respondents

On Petition for Rehearing with Suggestion
for Rehearing In Banc

Petitioner has filed a petition for rehearing and suggestion for rehearing in banc. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Young, District Judge, sitting by designation with the concurrence of Judge Wilkinson and Judge Niemeyer.

FOR THE COURT

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Courthouse
Tenth & Main Streets
Richmond, Virginia 23219

JOHN M. GREACEN
CLERK

Telephone
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February 19, 1992

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Re: 91-1435 Tipco, Incorporated v. AGRI 89-528-D

Dear Counsel:

I have been directed by the Court to request an answer to the petition for rehearing within ten days of the date of this letter, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure. Respondents' answer should be filed in the office of the Clerk on or before

March 2, 1992. An original and 14 copies of the answer are required by the Court.

Yours truly,

JOHN M. GREACEN
Clerk

By: /s/ Deborah S. Daniel
DEBORAH S. DANIEL
Deputy Clerk

cc: Stuart Ross Berger
M. Albert Figinski

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. § 706—Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

7 U.S.C. § 499(b)(4)—Unfair Conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commence—

> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transactions in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title;

7 U.S.C. § 499(h)

Grounds for suspension or revocation of license

Authority of Secretary

(a) Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

7 Code of Federal Relations § 46.26

Duties of Licensees

It is impracticable to specify in detail all of the duties of brokers, commission merchants, joint account partners, growers' agents and shippers because of the many types of businesses conducted. Therefore, the duties described in these regulations are not to be considered as a complete description of all of the duties required but is merely a description of their principal duties. The responsibility is placed on each licensee to fully perform any specification or duty, express or implied, in connection with any transaction handled subject to the Act.

Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

No. 91-1990

In the Supreme Court of the United States

OCTOBER TERM, 1992

TIPCO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture's finding that petitioner violated the Perishable Agricultural Commodities Act of 1930, (PACA), 7 U.S.C. 499a *et seq.*, was supported by substantial evidence.

2. Whether the Secretary acted properly by interpreting Section 2(4) of the PACA, 7 U.S.C. 499b(4), which prohibits PACA licensees such as petitioner from "fail[ing], without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any" transaction involving perishable agricultural commodities, to prohibit commercial bribery in the produce market.

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In the Supreme Court of the United States

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No. 91-1990

TIPCO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals, Pet. App. 1a-6a, is unpublished, but the decision is noted at 953 F.2d 639 (Table). The decision and order of the Judicial Officer of the Department of Agriculture (JO), Pet. App. 7a-54a, is reported at 50 Agric. Dec. 871. The initial decision and order of the Administrative Law Judge (ALJ), Pet. App. 55a-85a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing en banc was denied on March 13, 1992. Pet. App. 87a-88a. The petition for a writ of certiorari was filed

on June 10, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a wholesale distributor of agricultural produce and is licensed under the Perishable Agricultural Commodities Act of 1930 (PACA), 7 U.S.C. 499a *et seq.* In 1988, an investigation by the United States Department of Agriculture (USDA) of petitioner's competitor, Sid Goodman & Co. (Goodman), revealed that Goodman was bribing the purchasing agents of Magruder's, Inc. (Magruder's) and Fresh Value, Inc. (Fresh Value) to induce the agents to buy produce from Goodman rather than from competitors. This investigation also uncovered information indicating that petitioner had made a similar payment to William Crandall, a Magruder's employee, to induce produce purchases from petitioner.

The evidence indicated that Crandall had approached Tipco's Manager, Frank Spinale, at a time when Magruder's was behind in payments to Tipco in the approximate amount of $276,000. Crandall demanded that Tipco pay him a "brokerage fee" of 25 cents per container purchased by Magruder's. Spinale interpreted Crandall's demand to mean that Magruder's would not continue to purchase produce from Tipco unless these fees were paid to Crandall. Pet. App. 58a. Between June and November, 1988, Tipco paid Crandall $38,000 in such "brokerage fees." *Id.* at 3a.

2. The USDA filed a formal administrative complaint against petitioner seeking revocation of petitioner's PACA license. The USDA complaint charged in relevant part that petitioner flagrantly and repeatedly violated the first and third unnumbered

clauses of Section 2(4) of PACA, 7 U.S.C. 499b(4).[1] First, the USDA alleged that petitioner made false statements on invoices submitted to Magruder's in violation of Section 2(4) because the invoices did not accurately disclose the price paid to petitioner. The invoices failed to disclose the "brokerage fee" and failed to disclose that petitioner increased the price it charged Magruder's for its produce by 25 cents per package, in violation of the agreement between Magruder's and petitioner that Magruder's would pay petitioner a gross profit of only $1.50 per package above petitioner's costs. Second, the USDA further alleged that petitioner breached an implied duty owed to its customer, Magruder's, to refrain from bribing one of its employees.

The ALJ conducted a hearing and dismissed the complaint. The ALJ determined that PACA does prohibit commercial bribery in transactions between li-

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[1] The Secretary is authorized to revoke a PACA license when the licensee's violations of the statute are "flagrant or repeated." 7 U.S.C. 499h(a). Section 2(4) of PACA, 7 U.S.C. 499b(4), provides in relevant part as follows:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—
>
> * * * * *
>
> (4) For any commission merchant, dealer, or broker [1] to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; * * * or [3] to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction * * *.

censed produce dealers and their customers. He nevertheless concluded that the evidence was insufficient to establish a violation of PACA in this case. Pet. App. 74a, 82a. The ALJ observed that Tipco's invoices to Magruder's did not reveal the payments to Crandall; Magruder's had a written policy prohibiting acceptance of such payments; Crandall's supervisor at Magruder's, Stanford Steppa, testified that he did not have knowledge of the payments; Spinale testified that he never told Steppa about the payments; and no other witness testified that Steppa in fact had knowledge of the payments. Nevertheless, the ALJ concluded that Steppa's denial of knowledge was "not convincing." *Id.* at 76a. The ALJ according concluded that Magruder's had knowledge that petitioner was paying kickbacks to Crandall as early as August or September 1988, but nevertheless allowed the payments to continue. *Id.* at 82a.

3. On appeal, the Judicial Officer reversed the ALJ. After thoroughly reviewing the evidence and the law in an exhaustive opinion, the JO found willful, flagrant and repeated violations of the first and third unnumbered clauses of Section 2(4) of PACA, 7 U.S.C. 499b(4), and ordered revocation of petitioner's license, relying on the Secretary's earlier decision, *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169 (Sept. 26, 1990), aff'd, 945 F.2d 398 (4th Cir. 1991) (Table), cert. denied, 112 S. Ct. 1585 (1992) (*Goodman*). Pet. App. 4a, 20a, 27a.

The JO concluded that the inference that Magruder's was aware of the payments to Crandall was "not * * * supported by the record." Pet. App. 40a. The JO emphasized that Magruder's had a written policy prohibiting acceptance of such payments, and that he could not "glean from the record any apparent reason

why Steppa should want his employees to receive payments from suppliers." *Id.* at 41a. Steppa had testified that he was not aware of the payments, and the JO found that there was simply no credible evidence to contradict this testimony. He also observed that the ALJ in *Goodman* decided "this same issue in favor of Steppa's credibility." *Ibid.* The Secretary accordingly concluded that petitioner made payments to Crandall to induce him to buy more produce; that Magruder's was not aware of and had not authorized Crandall to receive such payments; and that the payments constituted willful, flagrant and repeated conduct warranting the revocation of petitioner's license. *Id.* at 4a.

4. In an unpublished per curiam decision, the court of appeals affirmed the Secretary's license revocation as a penalty for conduct in violation of PACA. Pet. App. 1a-6a. The court of appeals acknowledged that the JO's decision "directly contradicted the findings of the ALJ," *id.* at 5a, but stated that "the possibility of reaching two different conclusions does not prevent the agency's findings from meeting the substantial evidence test." *Ibid.* The court found that the JO's reasons for departing from the ALJ's findings were "apparent on the face of the JO's opinion and turn[ed] on the JO's differing interpretation of the evidence regarding Magruder's knowledge, or lack thereof, of the payments to Crandall." *Ibid.* The court concluded that "[o]n this record, there is substantial evidence, including Steppa's own testimony, to support the JO's conclusion that Magruder's was unaware of the payments." *Ibid.*

The court also held that the Secretary's decision was consistent with the court's earlier decision ~~in~~ AFFIRMING *Goodman*. Pet. App. 5a-6a. It found no reason to de-

part from *Goodman* on the facts of this case, noting that "[m]any of the same actors are involved and the conduct in question occurred in the same produce market." *Id.* at 6a.

ARGUMENT

The petition presents two questions. The first is whether the Secretary of Agriculture's decision, which reversed a factual determination of the ALJ, was nevertheless supported by substantial evidence. The second is whether the Secretary properly interpreted the "implied duty" clause of PACA to prohibit commercial bribery by produce sellers licensed under the statute. The court of appeals reviewed the record and held that the JO's decision was supported by "substantial evidence" even though it contradicted the findings of the ALJ, Pet. App. 5a, and affirmed the agency's adjudicatory determination that petitioner's actions violated PACA. *Id.* at 5a-6a.

The Fourth Circuit's decision to affirm the agency's holding in this case is consistent with *Sid Goodman & Co.* v. *United States*, 945 F.2d 398 (1991) (Table), cert. denied, 112 S. Ct. 1585 (1992), in which the Fourth Circuit affirmed the agency's finding of a PACA violation on very similar facts involving a different petitioner.[2] Neither of the questions presented by petitioner here is of any more significance than the questions this Court declined to entertain when it denied certiorari in that almost identical case. Neither question involves a split in circuit authority or a conflict with any decision of this Court. Further review is therefore unwarranted.

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[2] A copy of the government's brief in opposition in that case has been provided to counsel for petitioner.

1. Petitioner contends that the court of appeals erred by affirming a decision of a JO that overturned a factual finding made by an ALJ.[3] Petitioner claims that the court of appeals "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court," that certiorari is warranted under this Court's rules. Pet. 11. In fact, the court of appeals' decision was entirely within the "accepted and usual course" of review of agency decisions, which for more than 40 years has been that such decisions remain undisturbed on appeal if supported by substantial evidence. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 207 (1947); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938).

a. Under the "substantial evidence" review, the reviewing court is required to give deference to the findings of the *agency*, not the findings of an ALJ or trial examiner. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951); *Local Union No. 948* v. *NLRB*, 697 F.2d 113, 118 (6th Cir. 1982) ("Our review for substantial evidence requires this court to accept the *Board's* credibility determinations unless they are unreasonable.") (emphasis added); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("credibility findings made by the ALJ *and accepted by the Board* will not be overturned unless they are 'hopelessly incredible' ") (emphasis added), cert. denied, 461 U.S. 906 (1983); *Kopack* v. *NLRB*, 668 F.2d 946, 952 (7th Cir.) ("*Universal Camera* makes clear that it is the Board's decision, rather than that of the ALJ, which is subject to scrutiny by a reviewing court under the sub-

[3] This issue was not presented by *Goodman* because in that case the ALJ determined that PACA had been violated.

stantial evidence test"), cert. denied, 456 U.S. 994 (1982). The fact that the agency and the ALJ disagree does not modify in any way the requirement that the *agency's* determination be supported by substantial evidence. *Universal Camera Corp.* v. *NLRB*, 340 U.S. at 496; *Mattes* v. *United States*, 721 F.2d 1125, 1129 (7th Cir. 1983).

Thus, the sole issue properly before the court of appeals was whether substantial evidence supported the Secretary's determination. *Kopack* v. *NLRB*, 668 F.2d at 952. In deciding this issue, the court of appeals was required to consider the record as a whole, including the fact that the agency reversed the decision of the ALJ. But the ALJ's findings are not "sacrosanct" or "binding on the [agency] or the court," *Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975). The agency must be permitted to "substitute its judgment for that of the ALJ" even when the ALJ's findings are based on credibility determinations. *Mattes* v. *United States*, 721 F.2d at 1129; see *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1078 (9th Cir. 1977). Otherwise, there could be *no* appellate review of factual determinations. The ALJ's findings are accordingly just one "part of the record to be considered on appeal" by a reviewing court that is applying the "substantial evidence" standard.[4]

---

[4] The fact that the ALJ and the agency have reached opposite results, especially when the ALJ's decision was based upon observation of a witness's demeanor, may affect the appellate court's determination as to whether the agency's decision was actually supported by substantial evidence. See *Universal Camera*, 340 U.S. at 496 ("evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's

b. In this case the Fourth Circuit correctly and adequately applied the substantial evidence standard. The JO set forth reasonable and substantial grounds for his decision to reverse the ALJ, including the fact that Magruder's policy prohibited such payments, and there was "no apparent reason why Steppa should want his employees to receive payments from suppliers." Pet. App. 41a. Further, no witness testified that Steppa had knowledge, and the ALJ in *Goodman* had in fact determined that Steppa's testimony was credible. The court of appeals accordingly found that "the JO's differing interpretation of the evidence regarding Magruder's knowledge * * * of the payments to Crandall" was supported by "substantial evidence." Pet. App. 5a.[5]

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than when he has reached the same conclusion"); *Adolph Coors*, 497 F.2d at 1184 ("the [ALJ's] findings should be considered on review and given such weight as they merit within reason and the light of judicial experience") (citing *OKC Corp.* v. *FTC*, 455 F.2d 1159, 1162 (10th Cir. 1972), and *Universal Camera*, 340 U.S. at 496). But the mere fact that the agency has reversed the factual findings or credibility determinations of the ALJ certainly does not mandate a reversal of the agency's decision.

[5] The focus of petitioner's complaint seems to be that the JO ignored the ALJ's determinations as to the credibility of a particular witness. It is true that credibility determinations based upon the *demeanor* of a witness may have weight in an appellate court's substantial evidence review of a contrary finding by an agency. *Penasquitos Village*, 565 F.2d at 1079. But an agency is free to substitute its judgment for that of the ALJ even when the ALJ's findings are based on credibility determinations. *Mattes*, 721 F.2d at 1129; *Penasquitos Village*, 565 F.2d at 1079. Furthermore, as the Fourth Circuit noted, the ALJ's conclusion that Steppa was lying when he claimed not to know of Tipco's payments to Crandall seems to have been based more upon inferences from record evidence

There is no basis for further review of that determination in this Court. See *Universal Camera*, 340 U.S. at 490-491 ("[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.").

2. The second question presented by petitioner is an attempt to revisit the argument made unsuccessfully in *Goodman* that the Secretary erred by interpreting PACA in the course of this administrative adjudication. These arguments are almost identical to those made in the petition for certiorari

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than upon the ALJ's unique opportunity to observe witness demeanor. Pet. App. 5a. Rather than pointing to demeanor evidence such as the "expression of [the witness's] countenance, how he sits or stands, whether he is inordinately nervous, [or] his coloration during critical examination," *Penasquitos Village*, 565 F.2d at 1078-1079, the ALJ described such factors as the unlikelihood that Steppa would do nothing if Crandall was paying too much for inferior produce, Pet. App. 78a, and the fact that Steppa had "reasons to suspect that Crandall was up to something," such as the fact that Crandall had tried to have delivered to his home a television set meant for the company. *Id.* at 80a. Similarly, the ALJ noted that it was "a common joke" with other stores' produce managers that Crandall was on the take and inferred from an unfinished statement made by Steppa that Steppa was aware of these jokes, *ibid.* (even though, as the JO pointed out, these jokes preceded by several years the actual June 1988 beginning of the Tipco payments, *id.* at 41a). These are inferences drawn from the record itself and not from Steppa's demeanor; thus, even if the ALJ's demeanor determinations were entitled to special deference, these findings would not be.

in *Goodman*,[6] and they were fully addressed in our brief in opposition in that case (at 4-11). We have served a copy of our brief in opposition in that case on petitioner's counsel. As in *Goodman*, there is no reason for further review of these issues.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Petitioner contends that this case is different from *Goodman* because the ALJ here indicated that a strong case of extortion could be made out under the facts of this case. Pet. 17 n.15; Pet. App. 76a. The JO, however, rejected petitioner's contention that it had been subjected to extortion, in part because petitioner had available to it many "reasonable, legal alternatives to violating the law" and in part because even if the payments had been "extorted" from petitioner, a prosecution for bribery would not be precluded. *Id.* at 45a-50a. The fact that the unlawful initiative came from the recipient of the bribe rather than from petitioner does not make this case any more appropriate for further review.

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